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LOWELL LECTURES.

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THE

SCIENCE OF GOVERNMENT

AS EXHIBITED IN THE

INSTITUTIONS OF THE UNITED STATES OF AMERICA.

BY

CHARLES B. GOODRICH.

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1853.

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TO

JOHN A. LOWELL.

HAVING had an opportunity to observe the fidelity and solicitude with which you discharge the trust confided by the late John Lowell, by whose munificence THE LOWELL INSTITUTE has been established, permit me to say, his intention has been successfully carried into effect by your care and attention. Respectfully, I acknowledge my obligation for the kindness and courtesy which you have extended to me.

C. B. GOODRICH.

Boston, July 27, 1853.



## TO THE READER.

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THE following lectures were read before the Lowell Institute, commencing November 30th, 1852, ending January 7th, 1853. The contract for their preparation was made, in behalf of the Institute, by Benjamin E. Cotting, during a temporary absence of Mr. Lowell. The subject and its mode of discussion, were adopted by myself, with an implied understanding that mere party politics should be avoided, except so far as an exposition of the system might induce to their consideration. In any and every discussion of the system of government which exists in the United States, it should be borne in mind that it is, including the national and state sovereignties, limited and regulated by written constitutions. The people may amend these instruments without resort to a supposed right of revolution. They, by themselves or authorized agents, appoint the persons by which the trusts of government are executed; the persons so selected, with few ex-

ceptions, hold office for certain prescribed terms of time; during their continuance in office, they cannot rightfully transcend the written constitutions under and by which, in general terms, their duties are prescribed, however fascinating or desirable a departure therefrom may, at any time, be regarded.

The security of the American citizens, and of their free institutions, is dependent upon a constant, firm, and unwavering adherence to this fact; whenever and so far as it is disregarded, danger more or less extensive must be the result.

These lectures were read before a popular audience, and have been printed by the Institute upon its own suggestion. The writer has endeavored to avoid dry legal disquisitions, so far as the subject would permit; and has deferred to the opinions of others, so far and so far only, as they commended themselves by their reasons to his judgment. Political economy is only another term for jurisprudence. Jurisprudence is the science by which the duties of man, in a state of civil society, are ascertained and enforced.

C. B. GOODRICH.



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## LECTURE I.

THE CONSTRUCTION, DEPARTMENTS, AND PURPOSE OF THE SYSTEM, STATE AND NATIONAL, WHICH CONSTITUTES THE GOVERNMENT OF THE UNITED STATES.

THE citizens of the United States are somewhat conversant with the science of political economy. It is essential to the maintenance of their rights, to a proper discharge of their duties, that a knowledge of these rights, these duties, should be encouraged and increased. All men have certain essential and unalienable rights.\* Whenever, or wherever, they reside in proximity with each other, clothed with these natural rights, a limitation upon their exercise must exist, to prevent collision. It is certain that an individual, in a state of society, or of proximity with a neighbor, must exercise these rights so as not to destroy or impair those which appertain to every other individual. Hence the necessity and origin of government, and the recognition of the legal position which requires every person so to use his rights as not to destroy or impair the rights of another. The end of the institution, maintenance, and administration of government is, to secure the existence of the body politic; to

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\* *Constitution of Massachusetts, Part First, Art. I.* All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

protect it; and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life.\* In other words, the object of government is, to sustain and enforce limitations upon the supposed, upon the actual, natural rights of the individuals, upon which it operates, so far as a limitation of such rights is essential to the existence of well regulated civil society. Whenever individuals, passing in opposite directions upon the same public way, meet, each with equal right, they pass on opposite sides. Force is the basis upon which the power of every government has reposed, and ever must repose for its security. Government must have in its construction and within its control, capacity or power commensurate with any and every contingency to which it may be exposed. Nothing less is adequate to the accomplishment of the purpose sought to be attained by the establishment of government. This position is true of the system under which we live, notwithstanding we are, more or less, accustomed to think and to act as though we had no government, and no occasion for its restraining influence. The maintenance of private right, which is the purpose and end of government, is, in this country, to a great extent, and so far as the daily and ordinary relations of life are concerned, obtained through the instrumentality of the judiciary, whose noiseless step is perceived only by those who are the immediate parties to its adjudications. In this department, force coextensive with the entire power and strength of the government under which it acts is always found within its power and control. The most important inquiry which can arise in relation to any system of government is, — what quantity of power shall be confided — how and by whom shall it be exercised.

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\* Constitution of Massachusetts — Preamble.

A supposed solution of this question was discovered by those who established our system ; and it constitutes the difference between it and other systems. This solution consists in an assumption, that the least quantity of power which can with safety be relied upon as adequate to a maintenance of private and of public right, should be conceded ; that the direction and manner of using this power should be defined in written constitutions, having to some extent a permanent and fixed character ; that the persons or departments intrusted with its exercise should be designated by, and made responsible to, the people, for a proper discharge of the trusts reposed in them ; that a well educated people are competent to determine the quantity of power to be conferred, the time and manner in which, and the departments and persons by which and by whom it may be exercised.

Our system of government is the result of this assumption ; thus far, its soundness or accuracy has not been disproved or impeached. So long as its main foundation, the intelligence and integrity of the people, shall continue, no reasonable cause of apprehension or danger can arise. Whenever this foundation shall be broken, the system will go down — not because it does not possess or contain in its construction a grant of power, a grant of force adequate to its support, but because, whenever a majority of the people shall lose their intelligence and integrity, the persons who may, at the time, be charged with the duty of performing and executing the trusts of government, will be no better, no more honest, no more intelligent than will be those by whom they shall have been elected. It must therefore be conceded, that the form of government which may be adopted in any country, with any rational hope of success, must be in accordance with the habits, circumstances, and degree of civilization attained, of and by the people for whom it



is designed, and upon which it is to operate; that the quantity of power to be conferred may, within certain limits, be diminished in the same ratio, as intelligence, education, and integrity shall be increased. It must also be conceded, that the strength of our system, having its origin in the assumption to which reference has been made, does not depend so much upon its form, upon its constitutional capacity for self-preservation, as it does upon the moral power which is derived, and can be derived only from a correct, calm, and disingenuous public opinion. In ancient Greece, it was an admitted and received maxim, that, "to the king and to the commonwealth nothing is unjust which is useful."\* In the sense in which the maxim was understood, it had no foundation in morality or reason. In our political theory, nothing is useful which is unjust. I propose to examine this theory in some of its general features—to induce you to make, and, if possible, to aid you in an examination of it. I do not expect to present for your consideration any subject which has not been discussed and examined. I shall use the language and sentiments of others whenever either suit my purpose. If, in some instances, I present views which may be regarded as peculiar or erroneous, their peculiarity and incorrectness may be easily detected. Our system of government is composed of two distinct, sovereign jurisdictions, each limited by a certain and prescribed boundary, beyond which it cannot pass. Each sovereignty, although limited within its limit, is supreme; the limit and boundary of each are established by written constitutions. These sovereignties are known, the one as a national, the other as a state government; each operates upon the same territory, upon the same persons, upon the same things. The rights, duties, and

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\* Wheaton, *Law of Nations*, p. 5.

relations of every citizen are defined, regulated, and upheld, in some particulars and at some times by the former, in other particulars and at other times by the latter. The purpose of this double power, of this establishment and construction of an empire within an empire, in its most comprehensive aspect, is individual. It is to secure to the citizen protection in his person, character, and property. The national, designated the federal government, was proposed and designed to protect the citizen in the enjoyment of his life, liberty, and estate from any and every molestation or injury which might arise from the interference of foreign nations or their citizens, or of one state or its citizens with the internal arrangement and affairs of another; to regulate, in fact, the intercourse of the citizens of the several states with the citizens of every other state, and with the citizens and governments of foreign nations.

The state government was designed to protect its citizens in their intercourse with each other and within the state, to which they belong. This government reaches, if I may so say, nearer home, and operates upon and controls our rights, our duties, and obligations as members of society. It is the shield and the arbiter of our common and daily duties. Each of these governments is a government of law. The liberty of which we boast the enjoyment is regulated by law, and whenever it shall cease to be so regulated it will cease to be liberty. So long as you keep this truth in mind, and adhere to it, your institutions will withstand all assaults, external and internal,—they will enable you to reach the highest point of civilization,—they will enable you to make good the assumption of your fathers, that an intelligent, well educated people are competent to establish their own system of government, are competent to discharge its trusts.

Our country comprehends thirty-one states — thirty-one governments — each occupying a prescribed and well defined territory, which, so far as any other state is concerned, with some few exceptions, is exclusively its own. These states, in many particulars, are foreign to each other. The people of these several states are citizens of the state to which they belong, and within which they reside; they also have the capacity, the right to become citizens, at their election, of any other of the several states; they are also citizens of the federal government. The constitution of the United States is the charter of the national government. It contains, defines, and prescribes, in general terms, the system of government by which we are politically known to foreign nations, by which we are protected from their control, and by which the citizens of the several states, in their intercourse, are regulated. The government thus established is not a government of states, it is a government of the people. It was established, not by the states acting as sovereignties, but by the people. The instrument contains a distinct enunciation of this position. It says, "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."\* Notwithstanding this declaration, so clear and explicit in its terms, its truth and propriety have been questioned, and efforts have been made to resist, to pervert its plain import, — all of which have failed. As the states which compose the Union have increased in number, and as they may increase, — as the interests of different localities

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\* Constitution of United States — Preamble.



become more diverse, — the importance of this position, which is the foundation of the system, will be more manifest, and an adherence to it is essential to the success of the constitution. The late Chief Justice Marshall, in delivering a judgment of the Supreme Court of the United States,\* incidentally considered and stated the mode in which the constitution of the United States had been adopted, and its character as a government of the people. He says: “The convention which framed the constitution was elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal. It was reported to the then existing congress (which had been organized under the then existing articles of confederation) of the United States, with a request, that it might be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification. This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in convention; — they assembled in their several states; — when the people act, they must act in their states. The measures they adopt do not, on that account, cease to be the measures of the people, or become the measures of the state governments. From these conventions (of the people) the constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people; — the assent of the states in their sovereign capacity is implied in calling a convention, and thus submitting the constitution to the people. But the people

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\* *McCullock v. The State of Maryland*, 4 Wheat. Rep. 316.

were at perfect liberty to accept or reject it; and their action was final. It required not the affirmance of, and could not be negatived by, the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. The government of the Union, then, is emphatically and truly a government of the people. In form and substance it emanated from them. Its powers are granted by them and for their benefit. This government is acknowledged by all to be one of enumerated powers; — the principle, that it can exercise only the powers granted to it, is now universally admitted. But the question, respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise so long as our system shall exist. The government of the United States, then, although limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, any thing in the constitution or laws of any state to the contrary notwithstanding.” In a more recent case, the same eminent jurist affirmed these views, and again says: “The constitution (of the United States) was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictates. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers conferred upon the federal government are to be exercised by itself; — the limitations of power contained in the instrument, unless the contrary expressly appears, are applicable to the government therein created. The

states in their several constitutions imposed such restrictions on their respective governments as their own wisdom suggested — such as they deemed most proper for themselves.” \*

From these extracts, and from the short general view presented, it results that certain power, for certain paramount purposes no less important, has been confided to the state government by the people — the source and fountain of all power which either sovereignty, state and national, enjoys. All power and authority not so conferred resides in and with the people unrestrained, which they may exercise at will, exercising it so as not to weaken or in any way render unavailing and useless the powers surrendered. Individuals of other countries do not perceive how two jurisdictions can exist without conflict. Some of our own statesmen have occasionally feared collision. If conflict shall arise, it will result, not from the deficiencies or incompleteness of the system, but from a disposition, on the part of those who administer it, to lessen and detract from the rightful power and province of the one sovereignty, so as thereby, in fraud of the system, to build up and elevate the other.

This division of power is the source and secret of our security. As an illustration of the theory of our system a single exercise of power, in and by each sovereignty, may be stated, from which it will be perceived, that no danger or cause of conflict can exist. The federal government has the exclusive power to make treaties, to declare war. The state government has the exclusive power to prescribe the formalities with which a will or other testamentary paper shall be executed; to say how title to estates, real or personal, within its limits

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\* *Barron v. The Mayor and City Council of Baltimore.* 7 Peter's Sup. Ct. Rep. 243.

shall be acquired. These powers are not inconsistent, and the exercise of them by the different sovereignties to which they are confided cannot produce collision. These instances are understood; others more difficult of solution and more complex have arisen and must arise. They have been, and are to be controlled upon the same principle as the cases stated, with the addition of two well established propositions,—one of which is, whenever two jurisdictions, political or judicial, have concurrent power and authority, the one which first attaches upon its object, be it person, thing, or contract, cannot rightfully be displaced or impeded, until its rightful and legal purpose shall have been accomplished, until its power shall have been exercised, or voluntarily surrendered. The other is, that the constitution of the United States, and the laws and treaties of the United States, made in conformity with the constitution, constitute the supreme law of the land, and no state legislation can control it. It follows, if each sovereignty shall be content with its own trusts, each performing its peculiar duties, and asserting in good faith and in a spirit of comity its own rights, the two sovereignties will together constitute, as they were designed to constitute, one system. The right of sovereignty exercised by the federal government may be designated as external and occasional, although it is, in some particulars, internal and constant; that of the state government, as internal, and within its province, without interruption. If these rights are exercised by the federal and state sovereignties, within their respective limitations, they cannot come in conflict. And when a conflict occurs, the inquiry must be, which is the paramount law,—this must depend upon the supremacy of the power by which the law, the subject of the conflict, was enacted. The federal government is supreme in the exercise of powers delegated to



it; but beyond this, its acts are unconstitutional and void. The acts of the several states are void when they do that which is inhibited to them, or exercise a power which the people have exclusively delegated to the federal government. With an exception of the powers delegated to the federal government, the several states, resting and acting upon their original sovereignty, exercise their powers over every thing connected with their social and internal condition. A state regulates its domestic commerce, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. The state government regulates the contracts of its citizens, provides for their execution and performance, restrained only in this exercise of authority, by an inhibition, found in the constitution of the United States, "that no state shall pass any law impairing the obligation of contracts." Over these subjects the federal government has no power — they appertain to the state sovereignty exclusively. The powers of the federal sovereignty are equally exclusive.\* Whenever either jurisdiction shall be supposed to have transcended its appropriate limit, in matters of private concernment, those persons, the rights of which are thereby controlled or diminished, may correct the error, by recourse to the judicial department, state or national, as the one or the other may have jurisdiction. Each of the sovereignties, state and national, are divided into departments, through the instrumentality of which their several trusts are performed: these departments are designed to operate as checks upon each other. The federal sovereignty has three, — the legislative, the judicial, and the executive. The creation of these departments, the duties appertaining to each, and the mode in which

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\* The license cases, 5 How. Rep. 588. Opinion of Mr. Justice McLean.

they execute the powers conferred, may be learned by an examination of the constitution of the United States. The legislative power of the federal government is vested in a congress of the United States, which consists of a senate and house of representatives. This department, in the exercise of the authority or grant of jurisdiction with which it is invested, is subject to a qualified right of veto conferred upon the executive. The house of representatives is composed of members chosen every second year by the people of the several states. No person shall be a representative who shall not have attained to the age of twenty-five years, and shall have been seven years a citizen of the United States, and, at the time of his election, shall be an inhabitant of the state in which he shall be chosen. The representatives are, from time to time, apportioned among the several states according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. To ascertain the number of representatives, an enumeration of the people is made every ten years. When vacancies occur in the representation from any state, they are filled by an election for the unexpired term of two years.\* The senate of the United States is composed of two senators from each state, chosen by the legislature thereof for six years. No person can be a senator who shall not have attained to the age of thirty years, and shall have been a citizen of the United States for nine years, and at the time of his election an inhabitant of the state for which he shall be chosen. The presiding officer of this body is not a member, but is the vice-president of the United States, although in the event of

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\* Constitution of United States, art. i, sec. 2.

his absence, inability to discharge the duty, or death, a member of the body is chosen as presiding officer for the time being.\* The times, places, and manner of holding elections for senators and representatives shall be prescribed, in each state, by the legislature thereof; but the congress may, at any time, by law make or alter such regulations, except as to the places of choosing senators.† The senators chosen immediately after the adoption of the constitution, were, in accordance with the instrument, divided into three classes, the first of which went out of office at the end of two, the second at the end of four, the third at the end of six, years. The effect of which classification is, that thereafter and now, one third of the members go out at the end of every two years. The congress, of which I have given the component parts, is required by the constitution to hold at least one session annually. It may be convened more frequently by the executive, if the public interest shall require. The construction and organization of this body exhibits extraordinary capacity, great judgment, an accurate knowledge and comprehension of an enlarged, liberal political economy. It regards the popular will, it avoids the evils which might result from any sudden excitement, caprice, passion, or prejudice on the part of the people. It regards the dignity and political equality of the several states. An analysis of the provision to which I have referred will show the delicacy and distinctness with which these different elements have been regarded and blended. The representative is chosen by a direct ballot of the people. His term of office is short, so that every two years he returns to the people a private citizen, and may again be elected or not as the interest and judgment of his constituents may require. The senator

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\* Constitution of United States, art. i, sec. 3.

† Ibid. art. i, sec. 4.

is chosen, not by a direct suffrage of the people, but by the state legislature of the state from which he is elected. His term of service, his age, is greater. He is not so near, not so dependent upon the direct act of the people as the representative. It is presumed, therefore, that he will be less solicitous of his own immediate personal popularity, — that he will trust in this particular, to the calm, dispassionate judgment of his countrymen, acting upon a full survey of his course uninfluenced by any sudden, ill-advised outbreak of popular feeling. The senators of each state, as members of the senate, stand upon equal terms with those of every other state, so far as political power and authority is concerned, without reference to the population, wealth, or local position of the state which they represent. In this particular, the several states exercise an equal power and influence. The presiding officer of the senate being the second highest officer in the executive department, (the vice-president,) elected by the suffrages of a majority of the people of the several states, having no vote except the senators shall be equally divided, having no right to discuss the measures under consideration, will, it is presumed, be calm, firm, and uninfluenced in the exercise of his functions by any sectional consideration.\*

From this survey of the legislative department, it is difficult to perceive how or wherein greater or more effectual precaution could have been exercised to prevent arbitrary, oppressive, or sectional legislation; especially is it to be so regarded when we consider that the two bodies of which congress is composed act separate

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\* Constitution of the United States, art. i. sec. 3. There is no express provision that the vice-president shall not discuss measures before the senate; but as he is not a member of the body, he has no right, except to preside over the deliberations of the senate, and to vote in the event of an equal division of the senators voting.



from, and independent of, each other. In addition to these provisions, the qualified power of disapproval, with which the executive has been invested, may be regarded as affording additional security against unwise legislation.

The house of representatives was originally composed of sixty-five members, arbitrarily fixed and distributed among the thirteen states. This was designed to enable the government to go into operation and perform its duties until an enumeration of the inhabitants could be made, which was required to be made within three years. As the law now is, every state is entitled to at least one representative. With this qualification, the members cannot exceed one for every thirty thousand inhabitants.\* The number of senators cannot be enlarged or diminished beyond two from each state.† Each house is the exclusive judge of the election and qualification of its own members, — each prescribes its own rules of action.‡ The members are paid from the treasury of the United States, — they are privileged from arrest in all cases, except treason, felony, and breach of the peace, during their attendance at the session of their respective houses, and in going to and returning from the same. For any speech or debate in either house, they shall not be questioned in any other place.§ This construction of the legislative department manifests a design to uphold the power and authority of the people, against corrupt and oppressive government, against corrupt and unworthy legislators. Equally manifest is an intent to protect the people, to some extent, from themselves. It also exhibits an omission of any express provision by which the government of the United States may uphold itself, in a certain contingency, independent of any action by the

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\* Constitution of United States, art. i, sec. 2.

† Ibid. art. i, sec. 5.

† Ibid. art. i, sec. 3.

§ Ibid. art. i, sec. 6.

several states. Congress may effectually secure the continuance of the house of representatives by its own action, if the several states do not exercise the power confided to them in this respect; no such power is, unless by implication, conferred in relation to the senate. If every state in the Union should, at the same time, and for six consecutive years, decline to choose senators, an integral part of the federal government would become vacant. This omission was the subject of discussion before the constitution was adopted. It did not, however, create any alarm in the minds of those who advocated an adoption of the system, although it was regarded by Alexander Hamilton as an evil, but as an evil which could not have been avoided, without excluding the states, in their political capacities, from a place in the organization of the national government.\* The second department (adopting a classification resulting from the nature and the order of, and in which, the duties of the different departments are to be performed) is the judicial. The constitution provides, that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, order and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.† The judicial power shall extend to all cases, in law and in equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and mar-

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\* The Federalist. Lecture No. 59.

† Constitution of United States, art. iii, sec. 1.

itime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states.\*

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court has original jurisdiction. In all the other cases the supreme court has appellate jurisdiction, with such exceptions and under such regulations as the congress shall make. The judicial power of the United States is limited by the duties and rights of the federal sovereignty, of which it is an important part or element. The enumeration of its powers excludes its action upon any matter dependent for decision upon the municipal law of an individual or particular state; controversies between citizens of the same state, with a single exception, are not within its jurisdiction, unless they are dependent upon the constitution, upon some law or right of, or under the federal sovereignty. Controversies between citizens of the same state, except as already stated, are to be determined by the action of the judicial tribunals of the state in which they may arise or be litigated. With equal distinctness, rights arising under the constitution, under treaties, under the laws of the United States, the rights of ambassadors and of other public ministers, admiralty and maritime rights, suits in which the United States is a party, are to be exclusively adjudged by the federal jurisdiction, through the instrumentality of its judiciary.

The construction of this department exhibits several

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\* Constitution of United States, art. iii, sec. 2. Amendments of Constitution, art. xi.

prominent purposes sought to be accomplished. These are, that the foreign relations of the United States should be free from any control or supervision of any state sovereignty; that the treaties and laws of the federal sovereignty, individual right derived from, or under them, should be construed and enforced by itself. It exhibits the truth and power of the declaration so often made by the United States to all other nations, — “although many, we are one.” It presents also a clear and undoubted acknowledgment of the independence and supremacy of the several states, and of their laws, as a general proposition, in all local matters. It regards the sovereignty of the several states as applicable, with one or two limitations, to all matters to which it had extended before the adoption of the federal constitution, except those growing out of our foreign relations and intercourse, and the relation of the several states to and with each other. The arrangement by means of which the judicial power thus conferred is carried into effect, consists of the supreme court of the United States, of circuit courts, of district courts, of commissioners, marshals, and such officers as the courts may appoint to aid them in the investigations, and in the exercise of their respective jurisdictions. The supreme court of the United States is now composed of nine judges; it holds an annual session at Washington, the seat of the national government. The circuit courts correspond in number with the number of the states; the circuits correspond in number with the number of judges of which the supreme court, for the time being, shall be composed, the limits of which, territorially, are defined by law, and each circuit now comprehends three or more states. The district courts exceed the number of states, as some of the states are divided into two judicial districts, to avoid an inconvenience which might otherwise result from extent of

territory. The circuit court in each state is holden by a judge of the supreme court of the United States, and by the district judge of the district within which the circuit court is so holden, and provision is made by law, that the circuit court may, under some circumstances, be held by a district judge. Formerly, any one of the judges of the supreme court might preside over any circuit court within the United States; now, the judges are allotted each to a prescribed circuit. Every district court is holden by a district judge, ordinarily by the judge appointed for the district over which he presides, although, in some instances, a district judge may be called from one district to another. From this statement it will be perceived that the courts of the United States are of three distinct classes or divisions;—the judges of the courts of the United States form only two classes or divisions;—they are all appointed by the president of the United States, by and with the advice and consent of the senate;—they may be selected from any part of the United States, although they are ordinarily selected from the circuit within which they are allotted to preside. I have thus stated substantially the outline of the judicial department of the United States. It is not my purpose to present, in relation to any of the departments, all the particulars of which they are composed, or to which they extend, but it is to present a general view, such as will enable you to reflect upon the system, to discover its purpose, its adaptation to its purpose,—to judge of the accuracy of the suggestions in relation to it which may be made. In one particular the judicial department is distinguishable from every other department.

Its officers, the judges, in their appointment are more remotely and indirectly dependent upon the people; in their term of office they are less dependent upon the people than any other officers. This feature was made



a ground of objection to an adoption of the system, although it was in conformity with the plan of many of the state constitutions, almost all of which contained similar provisions as to the tenure of judicial office. In reply to this objection, it was said by a distinguished jurist\* that “the standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws. Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.” This course of reasoning, which was approved by the most eminent, learned, and patriotic

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\* The Federalist, Lecture No. 78.

men in the country at the time it was used, has since been doubted and disapproved. In many of the several states, at this time, the judicial tenure of office within the state is a term of years. Which system is the best, it is not my province to determine. It cannot, probably, be determined until we have had more experience of the new theory. The advocates of each have the same purpose, which is, an independent, honest, learned, and upright judiciary. Without a judiciary possessing such qualifications, private and individual right cannot be sustained for an hour. When private right fails in its security and protection, public right, which is only the general name applied to the collection of individual rights, will exist only in theory. The judicial department, therefore, although the weakest, in its unaided power of self-preservation, is the most important check which the people can have as a reliance against, and as a protection from, the encroachments of other departments. Like the main spring in a watch, it may not improperly or inaccurately be described as the power by which the legal capacity of all persons, and other departments, is determined.

I proceed to the third department of the federal system, the executive. This power is vested in a "President of the United States of America." He holds his office for the term of four years.\* Provision is also made for the election of a vice-president, who holds office for the same term, is the presiding officer of the senate, and "in case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president." In the event of a vacancy in both these offices, or inability in both officers to perform the duties, congress has power to determine

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\* Constitution of the United States, art. ii, sec. 1.

what officer shall then, for the time being, act as president. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of the federal constitution, is eligible to the office of president; neither shall any person be eligible, who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States. The mode of election of president and vice-president is prescribed in the constitution; they are not elected by a direct intervention or ballot of the people. Each state shall appoint (when an election shall occur) in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress. But no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. The time and mode at and in which the electors shall exercise their trust, is regulated by law. If they fail to make an election of president, the house of representatives shall make the election from one of the three highest candidates. If no election of vice-president shall be made by the electors, the senate make the choice from the two highest candidates.\* This mode of making an election of the president was resisted and supported, on the one and the other side, by able writers before the constitution was adopted. In the election, the people are required to act indirectly, through electors especially chosen for the trust. In support of the theory it was urged, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements that

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\* Constitution of United States. Amendments, art. xi.



were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.\* Although the executive department is vested by the constitution in a single person, the president, who is clothed with power and authority supposed to be adequate, the congress have established sundry subordinate departments, by the aid and instrumentality of which his duties are to some extent performed. These departments are now seven in number; the secretary of state, of the treasury, of the interior, of war, of the navy, the postmaster-general, and the attorney-general. These officers constitute the cabinet, the legal advisers of the executive. They are not responsible for the acts of the government in the same sense and to the same extent as the members of the cabinet of the British crown are practically responsible for the acts of the crown. The president of the United States is alone responsible for the fidelity with which the executive department is conducted. He is therefore vested with authority to select his advisers, subject to the consent and approval of the senate, which is always, or should always be given, unless some well founded cause of objection, other than mere political considerations, of a party character, exists to prevent a confirmation. To render the executive at all times free from embarrassment in the exercise of the duties with which he may be charged, he exercises an uncontrolled power of removal over his cabinet officers; they hold office subject to his pleasure. Their only security in office is derived from a faithful discharge of duty. Their title to the confidence of the community is in proportion to the ability and integrity with which their trusts are performed. I have exhibited

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\* The Federalist, No. 68.

the general construction and character of the federal government as a system, independent of any state government. The same prominent features, and the same principles of political science which are exhibited in this system, are to be found in the several state constitutions. Each state government has a written constitution, by which its powers, duties, and rights are defined; and they are to every substantial purpose the same, although provisions are found in some of these, which are not in others. Many of these instruments are preceded by, or contain bills of right, which are a collection or statement of some of the rights and privileges, which, it is supposed and assumed, are essential and unalienable; they contain an enunciation of some of the principles of government which are regarded liberal and free. They are similar to the charters or declarations of right which the English people, from time to time, have obtained from the crown, but are more extensive. In some of the states, religious tests and property qualifications exist, which are disappearing, and will soon give way to the popular feeling of dislike. In every state, I believe, the law of entail, by which land descends in a particular line, to the exclusion of all other branches, has been abrogated,—the effect of which has been in favor of liberty and the rights of the people. The acquisition of land is open and easy to every citizen who has ordinary industry and economy. The effect of the recognition of a right so dear to every man, upon civilization, upon the well being of society, cannot be stated in terms too broad or comprehensive. The purpose of the state government, as already stated, is to secure private right, to regulate the details and obligations of the citizen in a state of society, to operate upon the daily, the domestic conduct and pursuits of the people. The action of the state government is more constant, more visible, if

I may so say, and is nearer home than that of the federal government was designed to be, or can be. The territory over which the government of any particular individual state is extended, is not extensive; as a consequence its interests and capabilities are not diverse, and they are easily guarded and rendered available. To accomplish its purpose, each state government is divided into three departments, the legislative, the judicial, and the executive; each of which is organized substantially the same, and performs its functions in a manner similar to the mode in which similar departments in the federal government are constituted and perform their duties. In each government, state and national, the right to trial by jury, under certain restrictions and limitations, which the most intelligent and patriotic citizens of the country, heretofore, and now have approved and do approve, has been asserted and recognized in ample terms. In many of the states, the judicial tenure of office has been changed by provisions which make the judges elective by the people for a term of years. The effect of this change must be determined, as I have already said, at some future time. If found to accomplish its purpose, it will be adhered to and extended; if it shall operate to weaken and to lessen the independence and learning of the judges, the people will perceive it, and as a matter of safety will return to the original theory.

The system, of which I have endeavored to present an outline, is not a democracy; it is not a government administered from day to day, by the direct personal agency of the people. It is a republic, a government which the people, upon which it operates, established; they retain the power, under certain checks and limitations, designed to prevent impulsive action, to change its form by amendment; they elect some of the officers by direct personal ballot; they elect others through their

agents. Every officer in the state and in the federal government, holds his place by the power and authority of the people, exercised more or less direct. When elected, he continues for the term prescribed by law. Every officer is, in contemplation of law, regarded as a trustee, charged with the performance of certain duties, the execution of certain trusts, which are to be performed and executed in accordance with the several constitutions of our system, as the one or the other shall be applicable to his place and station, or to the duty to be performed. Whenever these instruments are silent, he is to perform his duty in harmony and in symmetry with their principles, in accordance with his own well considered judgment, aided by the suggestions and interests of his constituents, aided by all the information in his power, not forgetting his duty to his country, to himself.

The science of government, as exhibited in the institutions of the United States, may be defined the application of certain principles of political economy, contained in written constitutions established by the people, to the practical administration of the business and intercourse of life. An examination of this science, as understood in the system under discussion, will lead to several prominent conclusions.

1. The people are and should be the source of all legitimate political power.

2. This power is controlled and regulated in its exercise and application, by certain written constitutions, partaking of a fixed and permanent character, subject to change and amendment by the people, when found inadequate and insufficient, from any cause, to accomplish the purpose designed.

3. The powers of government are political trusts, to be exercised for the benefit and protection of the people, and not for the personal advantage or aggrandizement of those who exercise them.



4. The protection of private right, the protection of public right, which regards with equal favor the person, character, and property of every citizen or member of the community, is the only legitimate purpose of society.

5. The means of a substantial and general education are open and accessible to the mass of the people.

The adoption of the federal constitution, by which the people of thirteen independent states united for their common defence, protection, and welfare, by which the political principles or axioms to which reference has been made were promulgated, must be regarded as a new era in the science of political economy, as the commencement of a new and enlarged scheme for the civilization and advancement of the human family. Its success, its triumph, or its defeat will be promoted by your action, by your fidelity or want of fidelity, as the case may be. If this survey be accurate, I need not remind you that the intelligence, the integrity of the people, must be regarded as the main foundation of our system. Charters, constitutions, and theories of right, of liberty, perfect as they may be, beautiful as any production of the human intellect can be, will be unavailing and valueless to stay or check the downward course of a degenerate and corrupt people.

Thus far in our history, I have seen no evidence, from which to infer that the American people as a body are forgetful or unworthy of the position which they occupy, of the duty which their declarations have imposed upon them, to maintain and preserve their own rights, to do no wrong to the rights of others; in a word, to cultivate and encourage that moral courage which knows no fear, except the fear of wrong. I mean not to say, that our history has not presented, or that it will not present angry discussions, that we have not seen, shall not see, portions of the people from time to time maddened for

a moment, at some supposed or real infringement of their rights. Thus far, as the dews and mist of the morning yield to the power and brightness of the noonday sun, they have yielded to the sober second thought of the people. I might present many instances of the moral courage which I have commended. One shall suffice. It was exhibited by the late Chief Justice Marshall, whose name as a jurist and patriot will ever be remembered. Early in his judicial career, he presided at the examination and trial of Aaron Burr, charged with treason. The political associations and predilections of the judge were adverse to those of the party accused. The charge was of a character to excite suspicion and prejudice. The voice of popular condemnation was audible and distinct throughout the country. To these the judge yielded not, but administered the law of the land with a firm and even hand as he found it. In so doing, he accomplished more for the institutions which he had aided to establish, than he could have accomplished by directing the execution of an hundred traitors.

I have presented a portraiture, a general outline of the construction of our system of government. The deductions which may be drawn from this construction of a new system of political economy, of political rights, are important, and worthy the consideration of every citizen. These deductions are :— *First*. Each and every the federal and the state government, the several departments by and through which their trusts are performed, are limited. *Second*. The popular will, the voice of the people, indirectly operates upon, and, within certain limits, controls the action of the governments and of their departments. *Third*. The people act through the ballot; their will is not, and cannot, if I may so say, be judicially ascertained, or rendered available in any other mode. They act only through the institutions which they have



created; their right, excluding the power of revolution, is limited in its exercise by the capacity of the institutions so established.

The truth of these positions, the machinery by which they are maintained, the result upon ourselves, the effect which they have had or may have upon the institutions and conduct of nations, with which we have had or may have relations of friendship and commerce, will be illustrated in succeeding lectures.



## LECTURE II.

THE EXTERNAL RIGHT AND DUTY OF THE FEDERAL GOVERNMENT, AS SHOWN IN ITS  
TREATY-MAKING POWER.—INTERVENTION.—NEUTRALITY THE POLICY OF THE  
UNITED STATES. — NEUTRAL RIGHTS.

THE adoption of the federal constitution constituted a new era in the science of political economy. The internal character of the institutions of every country, although having no extra-territorial force, must and do operate, to some extent, upon the character of the institutions of other countries. The institutions of a country are the indices, the result of the character, the habits of its people. This influence is not and cannot rightfully be exercised by any direct, forcible intervention of one country in the affairs of another; it arises from their contracts, association, intercourse with each other. The right of suffrage, the elective franchise, recognized in all our constitutions as the right of the citizen, is a fact or principle calculated to excite the fears and doubts, to disturb the hopes of foreign governments in which it is not recognized, to encourage the hopes of those who exercise it; in fact, it exercises a moral power upon the destiny of kingdoms, of people, more potent and effectual to the accomplishment of good or of evil, than any other single fact can which has occurred in connection with our political history. The most essential, the most

important powers and duties of the federal government, are external. The articles of confederation adopted by the several states before the adoption of the federal constitution, were supposed to have been inadequate, and insufficient to protect the country and its rights from foreign interference and aggression. A number of distinct states or sovereignties could not so readily unite in hostile operations, or command the means for their support. The interests of the several states might not be influenced in the same manner, or to the same extent; hence the necessity of a more perfect bond of amity, a more perfect union, so as thereby to repel and to resist every improper intervention with our domestic affairs from abroad. The territorial position of the country, isolated somewhat from other countries, favored one system so far as foreign relations were to be regarded. Under a national government, treaties, the law and usages of nations, must be expounded in the same manner; whereas, adjudications on the same questions in thirteen or more states, or in three or more confederacies, might not, and probably would not, be consistent with each other. A diversity of opinion would result from the variety of independent courts and judges appointed by different governments, operated upon and influenced more or less by local laws and interests, by peculiar and conventional modes of thought. A similar difficulty and cause for disquietude would arise in and from the existence of thirteen or more different treaties made by the several states with foreign nations, each state acting for itself upon its own sovereignty. Treaties so made would not contain the same provisions, and our intercourse with other nations would not be harmonious. The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by, and respon-

sible only to one national government cannot be too much commended.\*

It was also reasonable to suppose, that the habits and pursuits of this country, judging from facts then existing, would be of a peaceful, quiet nature; that the political convulsions which European institutions had frequently sustained might be avoided. From these and similar considerations, which will readily occur from your reflection upon the subject, the foreign relations of the country, including the power to make and construe treaties, were confided to the federal government. Under the articles of confederation, the sole and exclusive right and power of determining on peace and war was vested in the United States, in congress assembled, except in certain specified cases of supposed imminent danger, which would not admit of delay until the United States in congress assembled could be consulted; in such case, the state in danger was authorized to act upon its own motion and responsibility. The power of entering into treaties and alliances, under certain limitations of power resulting from the legislative power of the several states, was also conferred upon the United States, in congress assembled.† Under the federal constitution the treaty-making power is not subject to the same disabilities, although it is limited, and, in some emergencies, may be liable to difficulty and embarrassment. By this instrument, the power to make treaties is vested in the president of the United States, acting by and with the advice and consent of the senate, two thirds of the senators present concurring.‡ The adoption of this instrument was advocated by many distinguished and patriotic individuals, who, subsequent to

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\* The Federalist, No. 3.

† Articles of Confederation, arts. vi. and xi.

‡ Constitution of United States, art. ii, sec. 2.

its adoption, entertained views different from each other in relation to the extent and construction of its powers. John Jay said, upon the subject under consideration, "The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions as will afford the highest security, that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good. The convention appear to have been attentive to both these points; they have directed the president to be chosen by select bodies of electors, to be deputed by the people for that express purpose; and they have committed the appointment of senators to the state legislatures. This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal taking advantage of the supineness, the ignorance, the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors.

As the select assemblies for choosing the president, as well as the state legislatures who appoint the senators, will, in general, be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only, who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The constitution manifests very particular attention to this object.\* This course of reasoning by Mr. Jay was approved by some, disapproved by others; it was adopted by the people, by their ratification of the instrument. The treaty-making power is indispensable to the due exercise of national sovereignty;

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\* The Federalist, No. 64.



that it should belong to the national government would seem to be irresistibly established by every argument deduced from experience, from public policy, and a close survey of the objects of government. It embraces all sorts of treaties for peace or war, for commerce or territory, for alliance or succors, for indemnity, for injuries or payment of debts, for the recognition or enforcement of principles of public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other.\* A treaty, made and approved in this form by the president, with the concurrence of the senate, is regarded as obligatory upon the nation, if it does no violence to the constitution. Notwithstanding the clear language in which this power is expressed, the house of representatives on one occasion claimed a right to participate in some way, to some extent, in the exercise of the power, to be consulted and advised with in relation to treaties. This supposed right was resisted by President Washington, and the grounds of his objection to the claim so set up, were ably and satisfactorily stated by him in a message to the house of representatives, presented March 30th, 1796, in which, after discussing the general reasons applicable to the subject, he says:—"It is a fact declared by the general convention, and universally understood, that the constitution of the United States was the result of a spirit of amity and mutual concession. And it is well known, that under this influence the smaller states were admitted to an equal representation in the senate with the larger states, and this branch of the government was invested with great powers, for on the equal participation of these powers the sovereignty and political safety of the smaller

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\* Story on Con. U. S., book 3, ch. 37, sections 777, 778.

states were deemed essentially to depend.\* The power to make treaties, in the language by which it is conferred, is general and unrestrained; it is not, however, unlimited; the power is not to be so construed or exercised as to destroy the fundamental law of the state. A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope, and no one embraces a right to annihilate any other. A treaty to change the organization of the government, to annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void, because it would destroy, what it was designed merely to fulfil, the will of the people."† A treaty is frequently designated a law, and is regarded as the supreme law of the land. It is more accurate to say it is a contract, having during its continuance the force and effect of a law, supreme in its operation, unless in conflict with the constitution of the United States. Practically, the treaty-making power is well guarded, and so far has been exercised without difficulty; there is, however, a manifest defect in its construction. Cases may arise, in which it may be provided in a treaty, that the United States shall pay to the other contracting party a sum of money. In such event, the executive, if occasion should require, *might possibly assume to pay*, if the means in the treasury should be adequate; otherwise the payment would depend upon the action of congress, of which the house of representatives constitutes a part, and might be defeated.

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\* Elliot, Diplomatic Code, vol. ii. p. 520.

† Story on Con. U. S., book 3, ch. 37, sections 777, 778.

This is a possible, but not a probable ground of future embarrassment.

After the treaty of 1794 with Great Britain, which had been negotiated by John Jay, had been approved by the senate, the house of representatives claimed the right to intervene, and to reject or carry it into effect at their election; a severe and angry debate was had, which resulted in a renunciation of the power claimed by a single vote. Treaties are, by some writers, designated as the laws of nations. They are not; they are merely obligations or contracts binding upon the parties thereto, and have no force upon nations not parties; they may be in accordance with the law of nations, or they may not, inasmuch as the contracting parties may make, for their own guidance and intercourse, such provisions as they may think expedient. Treaties may be referred to as having more or less tendency to show, what the law of nations upon a particular subject may be. A particular provision or stipulation, or an acknowledgment and assertion of a principle, may be inserted in treaties between different nations, so often and for such period or periods of time, as finally to be regarded as an admitted or well established usage among nations, and from such continued usage may have the force of a law of nations. The law of nations has, undoubtedly, been influenced by the science of government, as exhibited in the institutions of the United States. It has been influenced by the liberal political privileges and principles which we enjoy and profess. The conduct of other nations, the character of their citizens, and their ideas of right and wrong, of abstract justice have, no doubt, been influenced by our intercourse. A remarkable instance may be found in a treaty made by the United States with the Dey of Algiers in 1815, in which it is provided, that "the consul of the United States of America shall not be responsible for the debts con-

tracted by citizens of his own nation, unless he previously gives written obligations so to do." In the same treaty, it is provided, "If in the course of events a war should break out between the two nations, the prisoners captured by either party shall not be made slaves, they shall not be forced to hard labor or other confinement than such as may be necessary to secure their safe keeping until exchanged." This treaty also contains a declaration of the principle, by which we profess, and always have professed to regulate our intercourse with other communities. It is in these words: "As the government of the United States of America has, in itself, no character of enmity against the laws, religion, or tranquillity of any nation, and as the said states have never entered into any voluntary war or act of hostility, except in defence of their just rights on the high seas, it is declared by the contracting parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony between the two nations." \* A proposition to the English government to insert a provision that our consuls should not be required to pay the debts of American citizens, would be regarded as uncalled for; in a negotiation with the Dey of Algiers it might be of great import. The fact that such a provision was inserted in the treaty to which reference has been made, as had been a similar provision in an earlier treaty with the same party, exhibits the state of civilization of the party against whom such a provision was required, and it cannot be doubted, that ultimately it must produce in such party a higher and more elevated standard of right and morality. This treaty exhibits also, on our part, skilful diplomacy in yielding our apparent regard for the peculiar religious views of the other contracting party; it also exhibits, on our part,

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\* Elliot, Diplomatic Code, vol. i. p. 492, arts. 13, 15, 17.



an acknowledgment, that the religion and internal arrangements of a nation, are matters peculiarly within its control. In our treaties, in our intercourse with foreign nations, the existence of the elective franchise has been more or less effective. The treaty-making power, as I have shown, is limited ; it is indirectly reached by the ballot of our citizens. Foreign nations which negotiate with the United States, must do so subject to this limitation and capacity of our system ; in that way the system operates upon them.

In this way, and by our example, by our fidelity to our professions, and in no other way, we can rightfully influence, or interfere with, the political policy or institutions of other countries. An individual cannot with propriety interfere with the rights of another. Upon the same principle, a nation cannot interfere with the rights of another nation ; each must use its own rights, exercise its own sovereignty within its own domain, and without prejudice to other sovereignties. This is a fact or principle to which the United States have always professed adherence. An adherence to it is essential to our existence ; a violation of the principle would be a violation of our system, which, as I have endeavored to show, is limited in all its parts and departments, no one of which extends to the internal affairs of any country except our own. The most recent, most able and accurate writer upon international law says : " No state has any right to intermeddle in the internal affairs of another." This rule is a consequence of the legal equality and exclusive jurisdiction of independent states. A right of interference cannot be claimed by an ally, much less can it be claimed by a stranger. International rights and duties are reciprocal. No nation is entitled to exercise any right which it is not bound to allow under the like circumstances ; and as no powerful state would allow a feeble neighbor to inter-

meddle in its domestic affairs, so neither has a powerful state a right to intermeddle in the domestic affairs of a feeble neighbor. The perfect equality and entire independence of all distinct states, is a principle of public law generally recognized as fundamental. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor, and any advantage seized on that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their public and private capacities, to preserve inviolate. The exceptions which have been attempted to be ingrafted upon this principle are wholly inadmissible. Even such interventions as are humane and disinterested in their purpose, are illegal. Though they may be beneficial in act, they are pernicious in example; for charity may be made a cloak for ambition, and a state is no more justified than a private person in doing evil that good may come. Though its charity be genuine, a nation has no right to impose benefits upon its neighbors by force, or to gratify its humanity at the expense of their independence. To procure an eminent good by means that are unlawful, is as little consonant to public justice as to private morality. A nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose; nor in setting out on a moral crusade of converting other nations by acts of unlawful force.\*

The views which have been presented, and the character of the treaty-making power, will readily suggest to your minds the position which the United States should occupy in their relation to, and with other countries. The position to which their system of government

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\* Wildman on International Law, vol. i. pp. 47, 48, 49.



and its principles, distinctly point. That position is, in time of peace, non-intervention; in time of war, in which the United States are not involved, it is neutrality. In 1793, President Washington made a public proclamation, copies of which were sent to all foreign courts with which we had intercourse, in which he announced that the course of this country would be one of strict neutrality in the controversy then subsisting between England and France; that the duty and interest of the United States required that they should, and that they would with sincerity and good faith, adopt and pursue a conduct friendly and impartial towards the belligerent powers.\* This proclamation was condemned and disapproved in a series of letters written by James Madison, upon the ground that it was an excess of executive authority; that it was in its position a violation of certain treaty stipulations, which, it was averred, this country had entered into with France. On the other hand, it was approved and sustained in several papers written by Alexander Hamilton, who denied the supposed excess of executive authority, and contended that it was not a violation of any obligations which had been made by this country. Whether the one or the other of these eminent and able men were correct in their course of reasoning, I do not inquire; neither of them denied the principle of it, so far as it stated the position of the country to be one of neutrality, and rightfully so, independent of any supposed treaty obligation. In 1794, when Mr. Monroe succeeded Mr. Morris as minister of this country to the republic of France, the principles of the proclamation were reiterated.† They were sustained by the country in its official intercourse, and by an adherence to the policy which the executive had adopted, although it is true they were

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\* Elliot, Diplomatic Code, vol. ii. p. 512.

† Ibid. vol. ii. p. 515.

assailed by a considerable portion of the press and of the people. It is now conceded, that the policy of this country disclosed in its system, in the interests and habits of the people, is that of neutrality. An effort, however, has constantly been made in this country to enlarge the rights of a neutral nation, which efforts, have no doubt, to some extent, been successful ; these rights have been the subject of discussion and negotiation, and will no doubt, hereafter, be the subject of discussion and negotiation. The most prominent principles of international law, applicable to the interests and rights of a neutral nation, are : *First*. The supposed right of a neutral nation to carry in its ships the goods of a belligerent, and thereby during their transportation to afford to the goods of the belligerent an immunity and exemption from capture ; in other words, that free ships make free goods. *Second*. The right of blockade. *Third*. The right of a neutral nation, in time of war, to engage in the coasting or other trade of a belligerent, in which the neutral is not allowed to participate in time of peace. *Fourth*. The right of search.

It is not my intention to read a treatise upon these questions, or to consider them more extensively than is necessary to exhibit our influence as a country upon them. They are subjects upon which the pride of a free and independent people may be easily excited by mere politicians. A nation whose habits, position, and system, are adverse to war and its incidents ; whose interests can be more effectually secured by a continued state of peace, will naturally advocate an enlargement of the privileges and immunities which appertain to a state of neutrality. In accordance with such an inclination, the United States have always endeavored, in its negotiations, to enlarge them ; in all particulars in which the rights of a neutral could be regarded as defined and well established, in and

by the law of nations, the United States have not assented to or suffered any diminution of them to be made. The decided attitude of this country upon this subject has, without doubt, exerted a constant and perceptible influence in favor of neutral rights. The position that free ships make free goods, was a subject of discussion and of treaty stipulation before our government existed ; it had not, however, the same prominence which it has since acquired. Great Britain has inserted in several of its treaties with France, with Spain, and other powers, a provision yielding the right for the time being ; but she never ceased to deny the position, when set up as a matter of right ; has never assented to such provision in any treaty with this country which I have examined. The United States have entered into treaties with fifteen different powers, in which this right has been inserted. The first in time and in importance, is the treaty which was made with France, in February, 1778, before our independence was acknowledged by Great Britain. In this treaty it is provided, "that free ships give a freedom to goods, and that every thing shall be deemed free and exempt, which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted." \*

This position in this treaty had no little agency in a declaration made by the empress of Russia, in February, 1780, by and from which originated "the armed neutrality." This declaration or manifesto contained several articles, one of which is, "that the goods belonging to the subjects of the powers at war, shall be free in neutral vessels, except contraband articles."† Prussia, Austria,

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\* Stat. at Large, U. S., vol. viii. 24, art. 23.

† Wheaton, Law of Nations, pp. 295-297, 303.

Portugal, and the United States, the latter acting by an ordinance of congress, under the confederation, acceded to the principles of this armed neutrality. In 1794, the United States made a treaty with Great Britain which contained an article of a directly opposite character, which produced a hostile state of feeling on the part of France, manifested in its diplomatic correspondence, and by its seizures of the property of American citizens. This unfriendly disposition was strengthened by the opinion of France, that the proclamation of neutrality, made by Washington, to which reference has been made, was a violation of a treaty obligation, on our part, to assist the republic of France, according to our ability, in any conflict which it might have with England, provided such conflict should arise during the continuance of the war between Great Britain and this country. It was also manifested by two decrees made by "the Directory of France," in one of which it is declared that the United States had renounced, by their treaty with Great Britain, the privileges which it had previously enjoyed under its treaty of 1778 with France, and consequently, that enemy property taken by French cruisers from on board American vessels would be regarded as a legal prize. In the other it is declared, that all neutral vessels laden with property of an enemy would be liable to capture and confiscation.\*

These decrees were violations of the law of nations, and produced a state of quasi war between this country and France, which continued until the 30th of September, 1800, at which time a convention was entered into between the United States and the First Consul of France. By the terms of this convention, it was agreed that free ships should make free goods; that the citizens of either country might engage in the coasting trade of the enemy

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\* Wheaton, Law of Nations, pp. 389, 390.



of the other; that certain ships and goods which had been captured should be restored. This convention was followed by two others between the same parties, by one of which Louisiana was ceded to the United States, and thereby the early friendship and harmony of the two countries restored.\* Before these conventions were concluded, and in reply to the accusations of the republic of France and in vindication of the course of the United States, Marshall, Pinckney, and Gerry, American envoys at Paris, prepared an able state paper, in which it is said, "By the law of nations, free ships do not make free goods, nor enemy ships, enemy goods." The stipulation in the treaty of 1778 with France, formed an exception to a general rule, which retains its obligation in all cases where not changed by compact. That the treaty of 1794 with Great Britain did not concede a new right, but only mitigated the practical exercise of a right already acknowledged to exist. The desire of establishing universally the principle, that neutral ships should make neutral goods, was felt by no nation more strongly than by the United States. It was an object which they kept in view, and would pursue by such means as their judgment might dictate. But the wish to establish a principle, was essentially different from an assumption that it is already established. However solicitous America might be to pursue all proper means tending to obtain the concession of this principle, by any or all of the maritime powers of Europe, she had never conceived the idea of obtaining that consent by force. The United States would only arm to defend their own rights; neither their policy nor their interests, permitted them to arm in order to compel a surrender of the rights of others.† Whether the doc-

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\* Elliot, Diplomatic Code, vol. i. pp. 84, 92, 94, 109-116.

† Wheaton, Law of Nations, p. 388.

trine "that free ships make free goods," as a matter of right, as a principle of international law, is to be sustained, may be determined by an examination of the relative rights of the nations at war, in connection with each other as belligerents, and in connection with nations not engaged in the controversy. When two powers are at war, they have a right, between themselves, to make prizes of the ships, goods, and effects of each other; this is an undoubted principle of international law. Other nations occupying a neutral position have no right to say to those engaged in the conflict, that belligerents shall not, between themselves, exercise the immunities growing out of their relation to each other. As a general proposition it is equally clear, "that a neutral nation is not to be molested or impeded, in the exercise of its rights by its neighbors, who are at war with each other." Here then are, apparently, rights existing in different parties; a competition of right which may not be fully exercised, unless the one or the other shall, to some extent, yield its pretensions. How are they, upon abstract principle, to be reconciled or managed? When an individual enters into society, or finds himself a member of it, he yields a portion of his natural or supposed rights to the exigencies and to the uses of the association; he submits and agrees to use his privileges and immunities, so as not to destroy or impair the reasonable and lawful immunities of another. Nations, in their intercourse with each other, which intercourse is not a matter of original, positive right, in the one or in the other, but matter of comity, must in like manner act under an implied understanding not to impair the rights of each other; they are bound to regard the status or condition of those with whom they traffic. It would seem, therefore, to be reasonable that the right of a belligerent to seize the property of his



enemy upon the high seas, is paramount to any supposed right of a neutral, to give such property an exemption or immunity from capture, that free ships do not make free goods. This right of capture must be exercised by the belligerent upon his own territory, upon the territory of his enemy, or upon the high seas, which is territory common to all the world ; he cannot enter the territory of a neutral, which, by the principles of international law extends the distance of gunshot from the shore, generally computed by consent of all nations as a marine league. This results from the well established position, that the jurisdiction of a nation within its own territory is exclusive and absolute ; it is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. The world, being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under peculiar circumstances, of that absolute and complete jurisdiction within their respective territories, which sovereignty confers.\*

It is therefore evident, that the intercourse of nations independent of compact, is merely a matter of comity.

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\* *Schooner Exchange v. McFadden*, 7 Cranch Rep. 116.

The writers upon international law are not entirely agreed upon the question under consideration. The ablest, the earliest, and the latest writers are clearly in favor of the position, that free ships do not make free goods. Upon the same principle, which conduces to this result, it follows that the goods of a neutral on board the ship of an enemy, are not, because so found, liable to seizure, although goods in such condition are, in the first instance, presumed to be enemy property, and the neutral claimant must prove his title, and show that the shipment was made for his own legal purposes, and not to aid or facilitate the hostile operations of the enemy. The doctrine upon this subject has been recognized by the supreme court of the United States in conformity with what is supposed to be the weight of authority upon the subject, and this is to be regarded as decisive, so far as the United States are concerned. In the case to which reference is made, the court say: "The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded upon the plain and intelligible principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree

upon the character of the vehicle in which it is found.\* A neutral nation has no reason to complain of this position, because a neutral ship, having on board an enemy cargo, if seized and carried in for the purpose of confiscating the cargo, is entitled to freight from the captor, and thus suffers no injustice. A neutral vessel has a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to adjudication. A neutral vessel so employed, is entitled to her freight, as a lien attaching to the cargo. The captor takes *cum onere*. The freight attaches as a lien, which he must discharge by payment, provided, as it must always be understood, that there are no unneutral circumstances in the conduct of the ship to induce a forfeiture of this demand. Where a neutral vessel is brought in on account of the cargo, the vessel is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo. When such an incapacity on the part of the cargo occurs, the owner has done his utmost to carry his contract on to its consummation; it is a final execution as to the owner of the ship, inasmuch as it does not lie with him that the contract has not been performed. Freight is, in all ordinary cases, a lien, which is to take place of all others. The captor takes *cum onere*. It is the allowed privilege of a neutral to carry the property of the enemy, subject to its capture and the temporary detention of his vessel; and if he does not prevaricate, or conduct himself in any respect with ill faith, he is entitled to his freight.†

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\* The *Nereide*, 9 Cranch, Rep. 388; Wildman, International Law, vol. ii. p. 138.

† Wildman, International Law, vol. ii. p. 153.

The law in this particular, as stated, has been often recognized by Sir William Scott, one of the most eminent and learned judges which England has produced; whose judgments are no less distinguished for their classical and logical construction, than for the enlightened, sound morality which they exhibit. The position that the neutral ship, when captured in consequence of having enemy property on board, is entitled to freight from the captor, has also been recognized and upheld by the highest judicial authority in the country.\*

Although the principles which I have suggested may be considered as settled and sustained by authority, the United States have in some instances agreed, in its treaties, that enemy ships shall make enemy goods, and thereby upon grounds of temporary policy, yielded for the time being, its adherence to a course not in accordance with its general policy in relation to neutral rights.†

The right of a belligerent to impose a blockade upon the ports or harbors of his enemy, so as to prevent access thereto, has been universally conceded as the exercise of a right recognized by international law. Attempts have been made to establish constructive blockades, or as they are more familiarly and significantly called, paper blockades, all of which have signally failed.

It is stated by Chitty, using the language of Vattel, and citing his works and others as authority, that a belligerent may lay siege to a place, or simply blockade it, and having done so, he has a right to hinder any one from entering, and to treat as an enemy, whoever attempts to enter the place or carry any thing to the besieged; for the party attempting to enter, opposes the undertaking

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\* The Commoren, 1 Wheaton, Rep. 382.

† Treaty of Commerce with France, Feb. 6, 1778, art. xiv.; Convention with France, Sept. 30, 1800, art. xv.; Statutes at Large, U. S., vol. 8, pp. 20, 186.

of the belligerent, and may contribute to the miscarriage of it, and thus involve the party engaged in the conflict, in all the misfortunes of an unsuccessful war.\*

When a violation of a blockade is averred, three things must be made out in proof: the existence of an actual blockade, the knowledge, express or implied, of the party supposed to have violated it, and some act of violation, either by going in, or coming out with a cargo laden after the commencement of blockade.† A blockade must be declared by competent authority; the declaration is an act of sovereignty, and can be exercised only by the sovereign power, exercised ordinarily by the express direction of such authority. An exception to this is in some instances allowed; a commander going to a distant station, may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service on which he is employed. A blockade is to be considered as actually existing, when there is power to enforce it. A complete blockade cannot subsist, unless the besieging force can apply its power to every point of the blockaded port.‡ An accidental absence of the blockading force, being blown off by the wind, will not defeat a blockade, if the suspension, and the reason of the suspension, are known. A knowledge of the blockade in the party violating, is necessary, which may be attained by a formal notification from the blockading power, or by the notoriety of the fact.§ A blockade may be violated by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. A neutral ship, which may be in a port prior to the commencement of a blockade, may come out in

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\* Chitty, Law of Nations, p. 128.

† Ibid. p. 130.

‡ Mercurius, 1 Rob. Rep. 80.

§ The Rolla, 6 Rob. Rep. 367.



ballast ; or if laden with a neutral cargo, put on board before the commencement of the blockade, may proceed with such cargo. When a blockading squadron or force is driven off by a superior force, the blockade cannot be considered as actually subsisting. It is essential to the existence of a blockade, that the place should be invested by a competent force. It must be regularly maintained ; if some unprivileged ships are allowed to come out and others to go in, such a relaxation destroys the legal effect of the blockade. A blockade is regarded as an uniform, universal exclusion of all vessels not privileged by law. If such ships are allowed to pass, others will have a right to infer that the blockade is raised.\* A mere proclamation that a place is invested, is insufficient to constitute a legal blockade.† This position must be regarded as undeniable, supported by the concurring assent and approbation of intelligent jurists. It has not always been respected ; several efforts have been made to give force and effect to mere paper blockades ; these efforts have uniformly been resisted by the United States. If mere bulletins were allowed to take the place of actual force, in this respect, the commercial interest of the United States would become dependent, in time of war between European sovereignties, upon their caprice. Such result, or the establishment of such principle, would be felt by the people of this country at once ; it would be regarded inconsistent with our views of public law, at variance with our liberal system, the action of which is always indirectly controlled by the popular will. The doctrine of paper blockades, originated with the states-general of the Netherlands, in 1630, at which time they undertook by proclamation, to blockade the ports of Flanders, then in

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\* Wildman, *International Law*, vol. ii. pp. 179, 182.

† *The Betsey*, 1 Rob. Rep. 93.



the possession of Spain. In 1652, they undertook to prohibit all the world from trade with the English ; but in 1663, when Spain undertook to carry the same principle into effect, the states-general denied the existence of such right.\* In 1689, England and Holland entered into a convention, by which they undertook and agreed to interdict all neutral commerce with France, and to seize any vessel, whatever king or state it might belong to, that should be found sailing into or out of the ports of France, and to condemn both vessel and cargo as lawful prize. These instances were of little import. It was reserved to Napoleon to renew the doctrine, to give it some degree of importance, from the boldness and vigor with which he assumed the theory, and persisted in its execution, to the extent of his power. The Berlin and Milan decrees are as familiar as household words. They were met by the British orders in council, which were as regardless of the law of nations and the rights of neutral countries, as had been the decrees of Napoleon. The orders in council were sustained partially by the courts of admiralty, in England, not upon principles of international law, but upon the ground that France, by disregarding all law, had put itself beyond the pale of law, and as matter of self-preservation, England might well meet the enemy with its own weapons. The matter of blockade has frequently been the subject of treaty negotiation by this country with other nations, in all of which, an adherence has been maintained to the clear and reasonable rights appertaining thereto.

In some instances, the United States have obtained by treaty a recognition of the law of blockade, with all the modifications and safeguards for its exercise which could be reasonably required, which has produced a slight

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\* Wheaton, Law of Nations, p. 137, *et seq.*

modification of its rigor. Treaties, soon after our independence and government had assumed a degree of firmness and an ability to command respect abroad, were made with France and Great Britain, in which it was stipulated, that a ship sailing to a blockaded port, without knowledge of the blockade, should be warned off; that a vessel in such condition should not be liable to seizure, unless, after such warning, it should enter, or make an attempt to enter a second time.\* A mere intent to enter, not manifested by some overt act, or attempt to enter, has never been regarded as a breach of blockade. In April, 1804, some two or three years only before the British orders in council, to which reference has been made, the British government issued orders to its naval commanders not to consider blockades as existing, unless in respect to particular ports which might be actually invested, and in such case not to enter them. The principles of blockade, to which reference has been made, which I have endeavored to state intelligibly, and with proper limitations, have been discussed by the Supreme Court of the United States, whose judgments upon this subject are characterized for their learning and adherence to sound international law.†

The United States have been, and must be, indebted for a large portion of its commercial welfare, to a sound, honest interpretation and enforcement of these principles. Another right, connected with our natural neutral position, is, the right of a neutral nation, in time of war, to engage in the coasting or other trade of a belligerent, in which the neutral is not allowed to participate in time of

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\* *Fitzsimmons v. The Newport Ins. Co.* 4 Cranch, Rep. 185; *Yeaton v. Fry*, 5 Cranch, Rep. 335; *Olivera v. Union Ins. Co.* 3 Wheat. Rep. 183.

† Treaty with Great Britain, Nov. 19, 1794, art. xvii.; Treaty with France, Sept. 30, 1800, art. xii.

peace. It has been the policy of every maritime nation to keep its coasting trade in its own hands. Foreign nations have not been permitted usually to engage in it. A variety of considerations might be adduced, which will readily occur to you, showing the fitness of this rule. It may be regarded as a matter almost essential to self-preservation. If a foreign nation should be allowed to engage, in time of peace, in our coasting trade, it would afford to such nation great opportunities for acquiring an accurate knowledge of our views, the convenience or inconvenience of particular localities, as places of disembarkment in time of war, and generally to acquire a knowledge of our capabilities, of our weak and strong points, which might subsequently be used to our disadvantage. Our coasting, or home trade, is also essential to a nursery for seamen. It is a means of extending our intercourse as citizens of a common country, of increasing our wealth as a nation, and generally of adding to our comfort and security. Our navigation laws are in accordance with these considerations. Independent of these suggestions, and of authority which might be cited upon the subject, it would seem that a neutral nation cannot, in time of war, claim to have an enlargement or expansion of its rights. A neutral nation is obliged to modify, and surrender, in some particulars, as has been shown, its accustomed immunities, to the condition or status of nations at war. If allowed to enlarge them by the exercise of new and unusual rights, it would be able to protract and defeat the purpose of war, and thus operate to its own prejudice, and would, most probably, involve itself in the controversy of its neighbors. This matter, however, has been the subject of negotiation, and has generally been regulated, in treaties, in conformity with what would seem to be the natural or reasonable course to be adopted.

In one instance, at least, in a treaty made by this country with France, the right to engage in the coasting or in the home trade, and in the colonial trade of an enemy, in time of war, has been conceded. In a case before the Supreme Court of the United States, it was assumed, as a well settled principle of international law, that a neutral nation could not, with propriety or impunity, engage in the coasting trade of an enemy in time of war, independent of compact or treaty stipulation.\*

The only remaining topic to which your attention will be requested in this connection, is the right of visitation and search. In time of war, this right must be regarded as clear, in favor of the belligerent, as indispensable to his security. It cannot be questioned, so long as war shall be regarded one of the legitimate modes of defence, or an instrument to be employed in the assertion of right. Mr. Wildman, a recent able and accurate annotator, or writer upon international law, says: "Every vessel is bound to submit to visitation and search, whether it be a vessel of a friend, or of an ally, or even of a subject, and submission may be compelled, if necessary, by force of arms, without giving claim to compensation for any damages incurred thereby; if the vessel upon visitation should not be found liable to be detained, no circumstances can dispense with this obligation. A vessel is not exempted, either by its built, or its flag; such circumstances furnish no proof of the national character of the vessel; and if a vessel be neutral, a belligerent is entitled to ascertain, whether there is either enemy property, or contraband of war on board. If a master of a vessel resists search by force, that is a ground of confiscation. The right of visiting and searching merchant ships

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\* The Commoren, 1 Wheat. Rep. 382

on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. Until they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points, that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by particular inquiry whether there is property that can be legally captured, it is impossible to capture." Good faith and an observance of the law of nations is required from every neutral nation; if such nation does not regard the law in this particular, it cannot rightfully complain of the consequences which may and must result from such disregard of well established principle, and from its own violation of duty. The right of visitation must be exercised with as little harshness and vexation in the mode as possible; but soften it as much as may be, it is a right of force, though of lawful force, which cannot lawfully be resisted. It is an erroneous and wild conceit, that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. Resistance by a neutral to visitation and search, is regarded as cause of condemnation, without reference to the fact, or inquiry, whether an examination would lead to a detention and condemnation or not. Sailing under convoy of an enemy, is not regarded as a protection to the neutral, but as a manifestation of an intent or willingness to espouse and to uphold his interests. It has been sometimes agreed by nations, that a ship sailing under the convoy of an armed or public ship of the nation to which it belongs, shall not be subject to visitation and search. This, however, is not a matter of right,



is not regarded by the law of nations as a protection ; if this were so, the right of visitation and search might be rendered futile and nugatory. A necessary deduction from the principles discussed, results in the establishment of the position, to which reference has been made, that every right, public and private, is to be exercised and enforced, so as not to be incompatible with, or in violation of, the private and public rights of others.

This principle or fact cannot too frequently be the subject of your consideration and regard ; it applies to all the relations of life, which you can, or may assume as members of civilized society, as members of the human family, however extensive the limits and ramifications may be.

The supposed right of visitation and search, in time of peace, stands upon considerations entirely distinct from and dependent upon principles, which do not and cannot apply to a state of war. The right of search as applied, and as attempted to be applied in time of peace, has been the subject of discussion, between this country and England, since the establishment of our independence. It was the most prominent and the principal cause of the war of 1812. In the negotiations upon this subject which have taken place, our sense of right, of independence, the free and enlightened basis of our system, have been exhibited and adhered to with more constant and unwavering persistence, than in any other matter connected with our foreign relations.

In these negotiations our moral power and influence has been disclosed, and its propriety acknowledged. Great Britain, from the time at which she acknowledged our independence until a recent period, has claimed the right of visitation and search, in time of peace, upon two grounds, and for two purposes ; the suppression of slavery, and the taking from our ships its own seamen ; in

other words, the impressment of seamen. This claim has uniformly been resisted, and it may now, in consequence of our firmness, be regarded as abandoned. The purpose, the object to be attained by this claim, has great plausibility and may be sustained by very cogent considerations. The suppression of the slave-trade is desirable; every consideration of right and of humanity which can be suggested, favors any movement or effort which can be rightfully made in its accomplishment. It may then be asked, why not yield to the right of visitation and search, that thereby an admitted good purpose may be accomplished, and an admitted and barbarous wrong may be defeated and prevented? The answer is of a two-fold character; it is never right to do wrong that good may come. The conduct of a nation, like that of an individual, cannot be watched and controlled, in matters merely of a supposed moral character, by its neighbors, but must be left to its own guidance, to its own sense and appreciation of its duties, otherwise confusion and disorder would be substituted for peace and character. In other words, the conduct and integrity of a nation confined to its own borders and within its own jurisdiction, cannot be the subject of rightful complaint or interference, by those whose rights and immunities are not touched or impaired. Upon this question the conduct of the American government, and of those intrusted with its public functions, has ever been distinguished for its firm, unyielding, and unassailable integrity.

The suppression of slavery has ever been an object of solicitude to our government, the aid of which, to an accomplishment thereof, has been uniformly extended. The United States, in advance of other countries, by its penal enactments, declared the slave-trade to be piracy. It has often stipulated in its treaties, to assist in its suppression, by every reasonable effort in its power. In

1818, the English government undertook to establish the right of search, in time of peace, for certain purposes, among which was the suppression of the slave-trade; several governments assented; application was made to the United States for its approval, which failed. In reply to this request, Mr. John Quincy Adams, secretary of state under Mr. Monroe, was directed to say to the British government, that the solicitude of the United States for the accomplishment of the common object, the total and final abolition of the slave-trade, continued with all the earnestness which had ever distinguished the course of their policy in respect to that odious traffic. He was also instructed to say, that the admission of a right in the officers of foreign ships of war to enter and search the vessels of the United States, in time of peace, under any circumstances whatever, would meet the universal repugnance of the public opinion of the country; that no such right could be conferred by treaty, with any hope that it would be ratified by the advice and consent of the senate; that the search by foreign officers, even in time of war, was so obnoxious to the feelings of the country, that nothing could reconcile them to the extension of it to a time of peace, however qualified or restricted. Here, our system, its peculiarities, the power and influence of the people, of the popular voice, was seen and felt. The course of the country on this and on all similar occasions, was and has been, open, manly, and frank. We said then, as we say now, our morals, our duty, our sense of right and humanity is, and ever must be, in our keeping.

The right of search, in its other aspect, as claimed by Great Britain, that of taking its own seamen from our ships, the right of impressment would seem to be unobjectionable, as an abstract proposition. Why should the United States employ the subjects of other countries in

its ships, in its service, and set up a right, an immunity so to do. They do not, and should not assert such right; but they say, and rightfully, to the party which attempts to redress its wrongs, or to assert its rights in this mode, you cannot take the law into your own hands. If wrong has been done by the United States, it shall be compensated; the nation, in its sovereign capacity, is the dispenser of its own justice; it will not do, and cannot suffer wrong; it cannot leave to the casual, irregular, and accidental arbitrament of another, the redress of its supposed wrongs. In this particular, and upon this subject, it may well be said, our system, our principles, have exerted an influence, which has not been surpassed by that of any other nation. The right of exemption, the immunity from search, has been conceded by France, in a treaty made with the United States. England has not yielded the position, so far as I know, by express stipulation, but her statesmen have yielded the pretension. It may now be regarded as settled, as a well established principle of international law, that the right of visitation and search, in time of peace, under any pretext, cannot be sustained; that the flag of every country, in time of peace, must be regarded as a safeguard and protection to those over whom its folds are spread. In the assertion of this principle, in the ascertainment of neutral rights, the United States and its system have done much. The freedom which American citizens boast as their inheritance, the liberty regulated by law, which is the result of their system, have done much, have had an influence upon the institutions, upon the thoughts of other nations. It is for you to say, whether you will, by holding fast to your integrity, to your principles, to your system, continue to give force and effect to this influence. You must answer this for yourselves; not by your professions, but by your conduct, by an adherence to the union, by which your

political rights, as one of the nations of the earth, have been recognized and upheld, without which they must inevitably become the sport of every wind. The examination which I have made of our system, in its treaty negotiations, has increased in my mind the importance of maintaining our free institutions. It has disclosed its power and adaptation to any and every well educated, intelligent, well disposed people. God grant that it may be perpetual!



## LECTURE III.

THE EXTERNAL POWER OF THE FEDERAL GOVERNMENT.—AMBASSADORS.—THE WAR-  
MAKING POWER.—THE ACQUISITION OF TERRITORY.

THE relation of nations is in its character individual. It is the intercourse of government with government ; it is entirely distinct from the privileges which a nation within its own territory, as matter of comity or contract, may extend to the citizens of another. Upon this ground, a nation does not, *de jure*, officially or judicially know the internal character of the government, or of the institutions of other nations. A nation learns these particulars, so far as it may be fit and essential to learn them, so as to determine whether the condition of any particular nation is such as to render an intercourse with it practicable or desirable, and only so far as may be essential to determine whether political or commercial arrangements can be made, with a reasonable certainty of the existence of some power or authority adequate to make, to perform them. Whenever governments which exercise an absolute power, negotiate with each other, they may contract at pleasure. Not so when limited governments contract with each other, or with absolute governments. In such case, the unlimited or absolute government must regulate its official intercourse so as to conform to the construction and limited power of the government with which it con-

tracts. The external power of a government is, therefore, naturally and ordinarily executive in its character, and is exercised by the person or department which is intrusted with its political duties or associations. The treaty-making power in its exercise, as has been shown, is not confided exclusively to the executive, but is subject to the consent of an independent body, (a portion of the legislative department,) and may, in some instances, as has been shown, be controlled or defeated by the neglect or refusal of the legislative department to furnish the means of execution. The same distrust, or caution, the same limitation of power, is manifest in the appointment of diplomatic and commercial agents.

By the constitution of the United States, the president has power to nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors and other public ministers and consuls. During the recess of the senate, he may fill any vacancy which may occur in such offices; and appointments thus made may continue until the end of the next session of the senate. The president has the exclusive power to receive ambassadors and other public ministers from other nations, accredited to the United States. This discrimination is worthy of note.\* The character of a foreign minister is in accordance with the character of the sovereignty which he represents; his appointment is the exercise of an act of sovereignty. The nation to which he is accredited cannot regard the mode of his appointment as material to itself. The character of a minister sent from a country is material to the party by which he is sent. He may discredit his principal, may endanger the peace of his country, and be the means of producing disastrous collis-

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\* Constitution of United States, art. ii. sections 2 and 3.

ion. These difficulties are obviated, as the senate is required to pass upon the fitness of those delegated to represent the sovereignty of the United States and its institutions at foreign courts.

The privileges and duties of ambassadors and other public ministers, the matters which may rightfully be the subject of diplomatic correspondence, are not conferred or regulated by local or municipal law, but by the law of nations. In this particular our system has no peculiarity, but its influence is felt abroad through our diplomatic agents and correspondence. Prior to the fifteenth century, the intercourse of nations with each other, was irregular and casual. During that century and the next succeeding, it assumed a different character, became more frequent, regular, and permanent. During the period referred to, combinations and alliances were entered into between the European powers; some of which were for peaceful, some for warlike purposes. These gave rise to alliances, which to some extent have been continued to the present time, which were entered into to maintain a supposed or assumed balance of power, to prevent the acquisition by one nation of too much territory, or the attainment of a power not easily resisted, or which might become dangerous and alarming. These alliances were entered into by the executive, by the governments as such, acting independent of the people, and not as the representatives of the people, or of their will. As these alliances and combinations had no direct and immediately perceptible bearing upon the daily individual or domestic life of the people, they operated ultimately as the means of oppression, and as the means of sustaining, in different governments, the existence of an absolute power. In the seventeenth century, Louis XIV., by his diplomacy, added to his absolute power no less than by his arms, and by the wars in

which he constantly engaged. With his death, the power of the crown, which he had, for the time, accumulated and enlarged, was diminished, because France then had no internal institutions of sufficient capacity to uphold it. History is replete with instances showing that the power of the crown, of kings and of governments, is enlarged or diminished, is exercised for good or for evil, in proportion to the stability and permanence of their internal institutions, in proportion to the intelligence and the power of the people, whose progress, refinement, and elevation is the standard, by which the progress of society is, ever has been, and ever must be, measured.\* These alliances have given opportunity for an interchange between nations of their respective agents; have produced, in fact, the establishment of an international institution or system of diplomacy. Some of these agents are for political, others for commercial purposes. Ambassadors and other public ministers may be regarded as political agents. Some are intrusted with duties of a general and permanent character, others with those which are special. Consuls and their deputies are the commercial agents of the nations which they represent. Public ministers are regarded as the representatives of the sovereignty by which they are respectively appointed, and although resident in the country to which they may be accredited, they are not amenable to its laws or jurisdiction, civil or criminal. They are regarded as having an extra-territorial character and position. The immunities extended to them are the immunities of their principals, whose interests would be, or might be, defeated or injured, if the agents were subject to any law or control, except the law and control of the master. Their servants,

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\* Guizot on Civilization, p. 238 and 295, Eng. edition.

retinue, and assistants are protected. They are allowed to enjoy at their residences such religious rights and ceremonies as may be consistent with their individual views and belief, for the benefit and improvement of those attached to the embassy. These are some of their privileges, from which the character of, and the principles upon which, all their rights and immunities are founded may be deduced. These rights and immunities exhibit the extent and character of the civilization which the most prominent and powerful nations of the earth have attained. The effect and influence of which are reflected from and upon the communities by which such liberal, enlarged, and sound principles of reason and morality have been established.\* Notwithstanding the rights of an ambassador are now well defined and understood, they have not always been regarded, not always understood, as they now exist. Many gross violations have occurred. In the time of Queen Anne, an ambassador of Peter the Great was arrested in the streets of London for a debt of fifty pounds. He complained to the queen and to his own government. The persons engaged in his arrest were examined and imprisoned. The czar of Russia requested that the sheriff and his assistants should be put to death, to which the queen replied, that she could inflict no punishment on any the meanest of her subjects, unless warranted by the law of the land; and, therefore, was persuaded that he would not insist upon impossibilities. An act was introduced in parliament and passed, by which such violations of the law of nations were subjected to severe penalties. A copy was engrossed upon parchment and sent to the monarch, whose agent had been thus improperly arrested. This instance is a forcible

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\* Wildman, Law of Nations, vol. i. p. 78, *et seq.* As to consuls, see The Bello Corrunes, 6 Wheat. Rep. 152; Davis v. Packard, 7 Pet. S. C. Rep. 276.



illustration of the beauty and power of limited institutions, no less under a monarchy than it would have been under a republic. It exhibits the reason and fitness upon which all law is or should be founded.

A nation which has friendly relations with another, is bound to receive a minister accredited to it, unless some reasonable and proper objection can be made to the person accredited, or to his mission. The reception of a minister by the government to which he is accredited, is in effect an acknowledgment of the sovereignty and political existence of the power from and by which he is sent, upon the plain and simple ground, that an agent cannot exist which has no principal. The privileges of an ambassador continue not only during his residence in, but during his journey to, and return from, the country to which he is commissioned. So far as I have seen, the powers of an ambassador are said, by writers upon the subject, to cease upon the death of the sovereign to which he is sent, or by the death of the sovereign by which he is sent.

In some instances this may be so, but as a general proposition, it is not in my judgment sound. It is true, when a principal dies, his agent cannot continue to act; so when the principal dies, with which an agent of another is authorized to negotiate, no person exists with whom to conduct the agency, and the power cannot be exercised. This principle of reason and law cannot be applied to the case of an ambassador, or other public minister, who is not regarded as the representative or agent of the natural person who is king or president, but as the representative of government, which does not cease to exist, or lose its sovereignty, because its head or principal officer may have deceased. The duties of an ambassador, the character of the services which he is expected to perform, are well described in a circular

prepared by the government of the United States, for the guidance of its diplomatic agents. In this circular it is said, "Amongst the-most important general duties of a minister, or other diplomatic agent of the United States in foreign countries, is that of transmitting to his own government accurate information of the policy and views of that to which he is accredited, and of the character and vicissitudes of its important relations with other powers. To acquire this information, and particularly to discriminate between that which is authentic and that which is spurious, requires steady and impartial observation, a free, though cautious correspondence with the other agents of the United States abroad, and friendly social relations with the members of the diplomatic body at the same place. In their correspondence with the department of state, besides the current general and particular politics of the country where they are to reside, the diplomatic agents of the United States will be mindful, as they may find it convenient, to transmit information of every kind relating to the government, finances, commerce, arts, sciences, and condition of the nation, not already known, and which may be made useful to the United States. Books of travel containing statistical or other information of political importance, historical works not before in circulation, authentic maps published by authority of the state, or distinguished by extraordinary reputation, and publications of new and useful discoveries, will always be acceptable acquisitions to the department." \*

As a compensation for the immunities granted to public ministers, from respect to, and as matter of right in, their sovereigns, the persons so employed are expected to demean themselves in conformity with their dignity

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\* Elliot, Diplomatic Code, vol. ii. pp. 390, 391.

and position. They are not at liberty to meddle or intervene in any manner in the business, institutions, or local politics of the country to which they may be accredited. As already said, they enjoy extraterritoriality by which they are considered to live out of the territory in which they really reside ; this privilege should not be abused, or made the occasion of creating feuds or dissensions in the country, in which they enjoy such immunity. If a minister is regardless of his duty, he may be dismissed ; if he violates the law of the country where he is, complaint and application for redress should be made to the sovereignty he represents.

An instance of this character occurred soon after the adoption of the federal constitution. The proclamation of neutrality made by President Washington was disapproved by many citizens, and by a portion of the press, upon an assumption that it was a violation of the obligations which the United States had assumed in favor of France. The country was excited, and its stability seemingly endangered by its own citizens, actuated, as they supposed, or assumed to suppose, by motives of justice to their country and its neighbors. In this condition of things, Genet, ambassador of France, assumed the extraordinary and unwarrantable authority to inpower the French consuls throughout the United States, to act as courts of admiralty for trying and condemning such prizes as the French cruisers might bring into American ports. Under this assumed authority, which was a manifest and bold violation of the law of nations, a gross violation of the duty of the minister, vessels were seized by French armed ships, and brought into the ports of the United States for condemnation.

Our government remonstrated, without avail, to the minister who had forgotten his station and its duties. He persisted, made an appeal to the American people

through the press, and by means of his personal intercourse with them, addressed the president of the United States directly, instead of submitting his communication to and through the secretary of state, to whom all diplomatic agents should direct their official correspondence. A minister in this particular must conform to the pleasure and will of the country to which he is commissioned. The conduct of Genet, in these and in other particulars, was so gross, that the United States, through its minister at France, requested his recall. This had no effect upon his deportment, and his dismissal was recommended by some of the advisers of the president; by other advisers, this course was resisted as harsh and unnecessary. Washington yielded, against his inclination, to the milder counsel, and thereby compromised the self-respect of the nation. After some months had elapsed, subsequent to the request for a recall, France, in justice to itself, in justice to the law of nations, and to the decent respect due to this country, recalled its minister who had violated the sovereignty of our territory.\* In September, 1808, during the presidency of Thomas Jefferson, the reception of Don Onís, the minister of Spain, was refused, by reason of the insurgent condition of Spain. On the 5th of May, 1808, Charles IV. ceded all his titles to Spain and its dependencies to Napoleon. The authority and title of Napoleon was resisted by those who were in favor of the old royal family. By treaty made December 8th, 1813, Napoleon surrendered his supposed title to Ferdinand VII. of Spain. In 1815, Don Onís was received by the executive as minister of Spain. In 1818, the reception of a commercial representative of the republic of Venezuela was refused, because his name had been affixed

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\* Hildreth, Hist. of United States, 2nd series, vol. i, ch. 6; Ibid. vol. ii, p. 90;

2 Elliot, Diplomatic Code, 14, 15, 636.



to a paper drawn up in the United States purporting to be a commission to a public officer for undertaking and executing an expedition in violation of the laws of the United States, and also because he had signed a paper insulting to the government.

The principles applicable to public ministers, as recognized by the law of nations, to some of which reference has been made, have been acknowledged and upheld by the laws of the United States. The maintenance of these principles has been confided to the federal government, so as to preserve uniformity in their administration, so as to prevent any embarrassment in the external intercourse and relations of the country. The constitution of the United States provides, "that in all cases affecting ambassadors, other public ministers and consuls, the supreme court shall have original jurisdiction."

A statute of the United States provides, that the supreme court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. By another statute it is provided, "that if any writ or process shall at any time be sued forth, or prosecuted by any person or persons, in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein respectively, whereby the person of any ambassador, or other public minister of any foreign prince or state, authorised and received as such by the president of the United States, or any domestic, or domestic servant, of any such ambassador, or other public minister, may be arrested or imprisoned, or his or their goods or chattels



be distrained, seized, or attached, such suit or process shall be deemed or adjudged to be utterly null and void to all intents, construction, and purposes whatsoever."

In addition to these provisions, heavy penalties are imposed upon any person, who shall violate any safe conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister.\*

The supreme court of the United States, in its adjudications upon these matters, in discussing the rights of ambassadors, is guided by the law of nations. In one case the court say, should one sovereign enter the territory of another, with the consent, with the knowledge and license of its sovereign, expressed or implied, he does not thereby subject himself to its jurisdiction. Upon the same principle, a public minister, who represents his sovereign, is not within the jurisdiction of the sovereign at whose court he resides.† These principles have not been extended to consuls, who are regarded as commercial and not diplomatic agents, to the same extent as they are applied to ministers. Consuls, however, enjoy immunities equivalent, so far as their relation to the duties which they are required to perform render them essential. Consuls have power to claim the rights of property under some circumstances, which appertain to the citizens of the country which they represent, to institute legal proceedings in relation to such rights, to watch over their interests, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them.‡ They have the protection of the federal juris-

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\* Stat. at Large, U. S., vol. i. pp. 18, 80, 117, 118.

† The Schooner Exchange v. McFadden, 7 Cranch, 116.

‡ The Bello Corunnes, 6 Wheat. Rep. 152.

diction and its courts, in the assertion or defence of their civil rights; they are not above or beyond the civil or criminal jurisdiction of the country in which they reside.\*

It is common for a sovereign to employ as consuls the subjects or citizens of the country in which they are to be employed. No serious difficulty or objection can arise from this course; it may sometimes be a convenience. It is also competent for a sovereign to select as ambassador or public minister a person who is not his subject, but is a citizen of some other country. He cannot, for such purpose or agency, select a subject or citizen of the country to which the minister is to be accredited, without the consent and approbation of the sovereign to which he is accredited. Whether the president of the United States may receive a citizen of this country, as the minister of a foreign government, and concede to him the immunities of the station, and thereby enable a citizen to throw off his allegiance, may be regarded as doubtful. In my judgment, a citizen cannot, under our system, be thus successfully expatriated for the time being, and shielded from the power of the laws and institutions of his country.

I now proceed to a brief consideration of another external power of the federal government, the war-making power. This power, by the constitution of the United States, is conferred upon the legislative department. Congress has authority to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy. It may also provide for the organizing, arming, and dis-

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\* *Davis v. Packard*, 6 Peters, S. C. Rep. 41; same case, 7 *Ibid.* 276.

ciplining the militia, and for governing such part as may be employed in the service of the United States, reserving to the states the appointment of the officers.\*

In the construction, in the exercise of this most delicate power, the peculiarities of our system are apparent. Checks and balances are provided, designed to prevent any hasty or unwise exercise of it. The power of the people, as individuals, is clearly and distinctly seen and protected. It may be said, that they exercise the ultimate judgment. The most important peculiarity which is exhibited arises from the fact, that the war-making power and the peace-making power are not exercised by the same department. Congress may declare war. The president, with the consent of the senate, may make a treaty by which the war shall be determined and peace restored. Supplies cannot be granted for more than two years, unless they shall be renewed by new enactments; during which period of time, an election of new members must take place for the house of representatives, and by such election the policy of the country may be changed, and a refusal of supplies for a continuance of the war take place; at the same time one third of the senate will be composed of new members. Another feature is found in the respect paid to the militia, by authorizing the several states to appoint its own officers, so that the citizen, when called into the combats of his country, is, to some extent, under the protection and kindness of his neighbor and fellow-citizen, the business of whose life is not war but peace. These checks and balances demonstrate our policy, our system; they show that the object of war in this country is not the maintenance of a balance of power; is not to enlarge or aggrandize our empire, or to

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\* Constitution of the United States, art. i. sec. 8.

exhibit the star-spangled banner upon the battlements of a foreign citadel.

These checks and balances exhibit a far more noble purpose. They exhibit a purpose to maintain and preserve our rights as a nation, the perpetuation of our institutions, of liberty regulated by law. The purpose is self-defence, a protection from the encroachments, from the intervention of others, upon and with our domestic affairs. The provisions in our system to which reference has been made, are equivalent to a declaration on our part, that we desire to cultivate and extend our friendly relations and intercourse with and to all the nations of the earth.

The war of the revolution was justified, and is justified, upon principles which were, and are, consistent with the desire of the American people to suffer, to do, no wrong. It was, in fact, approved in the opinions and judgments of the most considerate statesmen of England during its existence, so far as they could rightfully approve an opposition and resistance to their government and its policy. The war of 1812 was justified at the time by those who advocated and supported the policy of the country upon similar principles; and, at this time, it may be regarded as justified, and its necessity sustained by the general judgment of the country. It operated as the means of the ultimate abandonment by Great Britain, of a supposed right to impress the seamen of our ships, of the abandonment of her claim to exercise, in time of peace, the right of search.

I am not forgetful of the fact, that our country has been engaged in other and more recent wars. They have not been so mellowed by time or distance as to be the fit subject of comment here. I leave them untouched, to be discussed at some other time, and elsewhere. In the short survey which has been shown of the war-mak-



ing power, you will readily perceive a distrust of, an intent to guard against, the executive department. The power of which I have spoken, regarded in its ordinary, or, if I may so say, its natural character and purpose appertains to the executive power of a country, and it has been so considered by writers upon political economy. The reason is, the exigencies of the state may be urgent and immediate. Whenever and wherever the operations of a state are conducted, and its institutions are established for the benefit of the state, as such, independent of the interests of the people as individuals and citizens, the power must of necessity be in the executive, in the head of the nation, so as to admit its exercise unrestrained and unrestricted. In the present condition of the civilization and progress of society, the state is regarded as identical in its character and interests with the character and interests of the people. It is assumed, that man was not created for purposes of state, but governments are, or should be, made and established for man. This fact is the all-pervading principle of our system. It is manifest in every part of its construction. Equally apparent is an intent or design to guard against any sudden or impulsive action of the people which passion or caprice might produce.

I now proceed to inquire, whether any provision is made in and by our system for the acquisition of territory. This is a matter or question upon which politicians upon the one side and upon the other have disagreed, adopting actions and opinions in conformity with some supposed temporary party policy. It is equally true, that jurists and statesmen, who have examined the subject without reference to party considerations, have entertained and expressed opposite views. My intention and effort is, and will be, to regard the system as it is, uninfluenced by any theory which might be considered convenient or desirable.



Territory is acquired by discovery, by conquest, or by purchase. It is the right of society to prescribe rules by which property may be acquired and preserved. The title to land must be regulated entirely by and upon the law of the nation within whose jurisdiction it is situate. Those who profess to speak and act only as moralists may say, that land is especially the gift of God, and, therefore, a nation or an individual, has so much right to it as has any other nation or individual, and can acquire no greater. This is an unsafe mode of reasoning, and forms no part of any system of political economy known to civilized nations.\*

Upon principles of abstract right, independent of society, independent of the progress of civilization and of Christianity, it would seem that the untutored native or occupant of a country, dependent for his education, for his knowledge of right and wrong upon the teachings of the Great Spirit, should not be disturbed, should not be compelled to yield to the progress and convenience of those who, in their own opinion, are more worthy, more competent to carry into effect the supposed purpose of the Creator in the creation of man. These principles have not been altogether acted upon, or entirely disregarded. The acquisition of territory by discovery has been regarded as a legitimate mode, and certain results or rights derived therefrom have been recognized. "On the discovery of the American continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might

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\* *Johnson v. McIntosh*, 8 Wheat. Rep. 543.

claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated between themselves. This principle was, that discovery gave right to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession."

Discovery followed by possession gives to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. The right of discovery, as described and as exercised, when applied to an inhabited country, is one of force. This right is modified and softened in its exercise, by nations professing the principles of Christianity, so far as it can be, without defeating the purpose of the discoverer.

In the settlement of this country, in the establishment of the relations which grew out of, and resulted from such settlement, the rights of the original inhabitants have not been entirely disregarded, although to a great extent they have been diminished and impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were diminished, and their power to dispose of the soil at their own will to whomsoever they pleased, was denied by the original fundamental principle that

discovery gave exclusive title to those who made it. Spain, France, Holland, and England severally claimed distinct rights upon the continent of America, as discoverers. These rights to a very large extent have ceased, and now are enjoyed by the United States. In the treaty of 1783, made by the United States with Great Britain, she relinquished all her claim to the government, propriety, and territorial rights, and every part thereof, in and to the territory of her former colonies. By this grant, political power, the right of sovereignty, so well as the right of soil was conferred, and the original inhabitants or occupants were not consulted or made parties to the arrangement by which their rights, by which their title to protection were transferred from one nation to another. By similar grants, the European governments are almost entirely excluded from North America. In this connection, it is proper to say, that our relations with the Indian tribes, has been as liberal and humane as it could have been without an abandonment of the rights of discovery to which we have succeeded. In all our treaties with them, they have been recognized as the rightful occupants of the territory; we have negotiated with them as domestic but dependent nations, have conceded to them our protection. In some of the treaties made by the United States with these tribes before the adoption of the federal constitution, it was stipulated that they might send a delegate to congress. Whether the privilege was in any instance exercised, I am unable to say.\* The Indian tribes are gradually but constantly receding, under a moral duress, from the rising to the setting sun. Such is the political right, such is the practical result of discovery. The acquisition of territory by

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\* *The Cherokee Nation v. The State of Georgia*, 5 Peters, Sup. Ct. Rep. 1; *Worcester v. Georgia*, 6 Peters, 515.

conquest, is simply the result of force, by which the country and its inhabitants are transferred, with or without their consent, from one jurisdiction to another. This right is continued by the force in which it had its origin, and determines with the cessation of force, unless the country, from which a territory may have been arrested, shall consent to a merger of the force, by a cession of the land and its sovereignty.

The acquisition of territory in this mode is attended by some favorable and mitigating considerations. The conqueror respects the private right of the citizens of the conquered country to property. The original laws of the conquered country are in force, until new laws and rules shall be established by the conqueror, except so far as they may be inconsistent, and incompatible with the fundamental law of the nation by which the conquest shall have been made. By conquest the former sovereignty is suspended, and so continues until restored by the conqueror, or until it is lost by the cession of the former proprietor, expressed by compact, or implied from his abandonment of all effort to regain his possession.\* Upon this branch of international law, the supreme court of the United States has vindicated and enforced the propriety of the humane principles upon which the law of conquest, in modern times, has been enforced.

The court say, it is unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change

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\* The United States v. Hayward, 2 Galli. Rep. 485.



their allegiance; their relation to their ancient sovereign is dissolved; but their relation to each other and their rights of property remain undisturbed. A cession of territory by one sovereign to another, is never understood to be a cession of the property belonging to its inhabitants.\*

Another mode of acquiring territory is by purchase; the course and effect of which is familiar, and need not be repeated. It gives rise to only one question of importance, which is of a moral character. This question is, upon what principle of right or reason can a sovereign, without necessity, upon his own motion, transfer a portion of his territory and its inhabitants to another jurisdiction against their consent. It is not essential to the purpose for which reference has been made to these different modes of acquiring territory, to discuss the question suggested. I have referred to them and to their principal incidents, for the purpose of inquiring whether the federal or state governments can rightfully and without violence to our system, acquire new territory, in either of the modes pointed out; and if these governments or either of them can so acquire territory, under what circumstances it may be done.

The several state governments, when the federal constitution was adopted, had certain definite territory, the bounds of which were supposed to have been, *de jure*, well defined, and capable of demarcation. Whenever new states have been admitted, their territorial limits have been defined, in terms and by limits capable of ascertainment.

The several states, as independent sovereignties, cannot acquire new and additional territory by discovery or by conquest. They cannot enlarge their several domains

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\* The United States v. Perchman, 7 Peters' Rep. 86, 87.



in either of these modes. If such rights can be exercised under our system, they appertain to the national government. Equally clear it is, that the several states cannot by purchase extend their sovereignty, or that of the United States, over new territory, with or without its inhabitants. The construction and purpose of our system forbids. The clause in the constitution of the United States which regulates the admission of new states, in its effect, must be regarded as prohibitory of the acquisition by the several states of additional territory, without the consent of congress.\* In any and every discussion of the subject under consideration, the principles of political economy, distinct from mere party politics, should be regarded, as they are modified by our peculiar institutions. I refer to the acquisition of territory and of its sovereignty, for the purpose and as the means of enlarging and extending our political rights and our sovereignty. In this sense and for such purpose, the several states have no right to acquire new and additional territory. I do not intend to say, that a state government cannot acquire the title, the right of property in and to soil, in and to land within its limits, or, in some instances, without its limits. This right may, undoubtedly, under some circumstances and for some purposes, be rightfully exercised.

The question, considered with reference to the power of the federal government, must be determined by a construction of its constitution. This instrument, excluding the right of amendment and the power of revolution, cannot be enlarged or diminished by the united will of the people or by the united voice of the several states as sovereignties, or by both combined. It is the opinion of some individuals, that the constitution of the United

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\* Constitution of United States, art. iv. sec. 3.

States should be construed with great strictness and exactness ; that no enlargement can rightfully result from any mere legal intendment or logical deduction ; that its language is to be literally construed ; that no power, unless conferred in express terms, can be exercised. Some entertain a different opinion, and contend, that it should receive an open, liberal, and enlarged construction ; that it may, by intendment, by deduction, be made available to carry out this or that purpose ; that this country is, in fact, an example and propounder of free institutions, of free principles ; that our system was and is designed to uphold these institutions and these principles at home and abroad ; that the genius of America has no limit. Neither of these positions are sound.

The constitution of the United States is to be construed, its meaning and its powers ascertained, upon and by the same principles of construction, by and upon which the force and effect of any other instrument is to be ascertained and determined. These principles are well understood, although their application may be occasionally a matter of difficulty and embarrassment. Instruments are to be construed by an interpretation of the terms contained therein, by the subject-matter or purpose sought to be attained ; by a consideration of the relation which the parties to the instrument bear to each other. These constitute the prominent elements of construction. The language of an instrument, as a general and primary proposition, is to be understood according to its natural, ordinary import, as received and recognized by those whose language it is. In some cases, it may have a technical meaning deduced from an artificial import given to it when used in explanation of the arts of science or law. The purpose of an instrument is to be accomplished and carried into effect, if it legally may be. Language will receive a liberal construction, whenever

such construction is essential to uphold public institutions and public right. On the other hand, when the purpose of an instrument is in derogation of private right, is to the prejudice of such right, a close construction is adopted. The relation which the parties to an instrument bear to each other, may be referred to and considered for the purpose of ascertaining whether any proposed construction or result is or is not in harmony with the rights and duties naturally and ordinarily compatible with such relation, with such condition of the parties.

The importance of the relation which contracting parties bear to each other, as a means by which to ascertain their relative rights, and the extent thereof, will be conceded, if you direct your attention to some of the business transactions of life with which you are conversant and familiar. An agent may, unless specially restricted and forbidden, employ such modes and means of action, by which to accomplish the purpose of his agency, as are commonly and ordinarily regarded fit and convenient to such procuration. A principal may ordinarily direct the action of his agent, may enlarge, diminish, or determine the agency at pleasure. A principal may create an agent with a power or authority attending it irrevocable. In such case, within the limit of the agency, the power of the principal cannot be regained, unless and until the object of the power is accomplished or compensated.

The power of an agent may be enlarged, in some instances, by necessity.

The master of a ship sent upon a foreign voyage is authorized to sail the vessel in the employment designated by the owner, and is bound to return at the end of the voyage or other authorized period. In the course of such authorized employment, and before its contemplated determination, the ship, in some distant place, may be disabled, to such an extent and under such circumstances

as to authorize a sale of the vessel by the master ; in such instance the power of the agent, of the master, is from necessity enlarged, to an extent coextensive with the exigency of his condition, and of the property in his possession. It is not my intention, by this illustration, to approve a very common expression, that necessity knows no law, because it is certain that the law does not and cannot regard such necessity. The same principles are also applied to matters of trust. The trustee must follow the deed of trust, the charter or authority under and by which his trust may have been created or defined. He may, however, whenever he acts in the absence of special restrictions, employ the most convenient and suitable means of executing his trust. The power and authority of a trustee will be construed, unless some clear legal ground of objection exists, so as to uphold the intent and purpose of the trust.

A fee-simple or perfect indefeasible title to land cannot ordinarily be acquired, except by the use of certain known technical terms. Notwithstanding the truth and propriety of this general position, if a trustee is charged with the performance of a certain duty clearly pointed out, and the estate granted to him for the purpose of the trust, if technically considered, is not sufficient for its accomplishment, the estate is enlarged by intendment, to prevent and avoid a failure of the trust, which might otherwise occur. A factor, intrusted by a foreign correspondent with the sale of goods, if not restricted, may sell upon credit, if such is the usage of similar agencies at the place of the residence of the factor. These principles, by which private agencies and private trusts are made available and effectual, are applicable to public agencies and trusts. Upon a reasonable and legitimate application of these principles to public trusts, to the trusts of government, the question arises, Can the federal government



rightfully and constitutionally acquire new and additional territory, new and additional sovereignty, and thereby enlarge its domain, for the purpose of increasing its sovereignty, its political power, or for the purpose of extending the area of freedom, of free institutions? The same question may be proposed in different language, more decisive in its effect upon the mind. Suppose the government of Great Britain, entertaining the belief that its colonies upon the American continent are not worth the cost of preservation; or for any other reason satisfactory to itself, should propose to sell and transfer its sovereignty in and over them to the United States for a stipulated sum of money, can the federal government make the purchase and assess its citizens by direct taxation, or by applying the proceeds of the public lands, or by using other money in the treasury of the United States for such purpose? The answer to this inquiry, in either form in which it has been stated, must most certainly and unequivocally be, that the federal government has no such power derived from any express provision in the constitution, or from any legal intendment which can be constitutionally deduced from its terms or from its purpose. Another mode of acquiring territory and its sovereignty, is by discovery. Citizens of the United States may discover some land, and take possession thereof under circumstances which, by the law of nations, would authorize the United States to assert title as the first discoverer. Has the federal government power, under such circumstances, to assume and exercise its supposed right as discoverer, establish territorial or colonial governments dependent upon and subsidiary to its own jurisdiction, and ultimately admit the territory so discovered as a state of the union? It is clear to my mind, that the constitution of the United States confers no such authority. In the instances suggested, the acqui-



sition of territory, by purchase in the one case, by discovery in the other, might be an advantage to the United States. Such acquisition would extend the privileges which our institutions are designed, are competent to confer.

If the people, through their agent and representative, the government, or by an expression of opinion through the press, and voluntary conventions, are content; if the several states as sovereignties are satisfied, why not accomplish a great and good purpose? The people are the government, and their will is its law. Reasoning of this character may be adopted in abundance, and it may be plausible, and even satisfactory to many minds. In my view it is erroneous, fallacious, and dangerous. Our system, as I have repeatedly said,—and the proposition cannot be repeated too often,—is limited. It was established for our protection, and not for the protection, elevation, or advancement of other people, of other countries, except so far as they may be enlightened, admonished, and improved by our moral example and influence. The will of the people cannot be known, cannot be exercised upon or through the government, except through and by the machinery and working of its institutions, which they have established as checks upon themselves and upon the government. The power of congress to extend its sovereignty, to acquire new territory, merely because such extension and acquisition would be convenient or desirable by conquest, has never, to my knowledge, been asserted.

An examination of the federal system of government, will show that the acquisition of territory and sovereignty, is not in express terms authorized or suggested. It does not appear to be one of the objects for which the constitution was adopted. If the instrument is to receive a close, strict construction; if its language is to be literally

understood, excluding every intendment which may be deduced from the general object of government, or from the peculiar situation in which the country may at any time be placed; then, the federal government cannot enlarge its territory, or extend its jurisdiction under any circumstances. Cases may arise in which such a result would be disastrous, and even might be fatal to the system. If this is the only theory which can be adopted, the action of the government in transactions which have passed, in several instances, cannot be sustained. Territory has been acquired from Mexico, by conquest, perfected by cession. The territory which constitutes the state of Louisiana was acquired by treaty made with France, 30th April, 1803, by which the then colony or province of Louisiana was ceded by the French consul to the United States, forever and in full sovereignty, with all its rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic. In consideration of this cession, the United States paid to France eleven and a quarter millions of dollars, and agreed to pay certain debts due from France to citizens of the United States, which existed prior to the 30th of September, 1800. This territory, rightfully or wrongfully, now constitutes one of the states of the federal union. This cession of territory put an end for the time being to controversy between the United States and France, added a beautiful and valuable tract, and removed the danger which might, and probably would have resulted from its continuation in the occupation of those who were alien in blood, alien to our institutions and interests. This cession was approved at the time by some portion of the community, by another condemned in terms of unmeasured severity. Its constitutional propriety was advocated and maintained upon the ground that "the people of the United States, in the establish-

ment of its constitution, intended to provide for the common defence, promote the general welfare, insure domestic tranquillity, and secure the blessings of liberty to themselves and posterity.\*

These words, which are found in the preamble to, and also in the constitution standing alone, cannot be regarded as a positive or an express authority to the federal government to extend its territory or jurisdiction, under any and all circumstances. They may be considered, under some aspect or condition of things, as having a bearing upon the construction or purpose of other provisions, or upon the exercise and execution of certain admitted powers of the federal government. The acquisition of Louisiana was upheld by its advocates, under the power of congress to admit new states.† “New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress. The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States.” Such is the language of the constitution upon the subject of the admission of new states, and the management of territory belonging to the United States. An examination of the discussion upon the subject-matter of this provision, which was had in the convention by which the constitution was prepared, will show that it had not in its origin or purpose, any bearing upon the acquisition of new and additional territory. It was designed by those who made it, to regulate the territory which at the time belonged to the United States or

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\* Constitution of United States, art. i. sec. 8.

† Ibid. art. iv. sec. 3.

to the several states. The discussion may be read in the Madison Papers.\* An examination of the provision, without reference to any supposed purpose or opinion which was entertained by those who prepared it, will lead to the same conclusion.

There are other provisions in the constitution to which, in this connection, no reference has been made, from which the power and authority of the federal government to acquire additional territory, and a consequent enlargement of its sovereignty, must be derived, or it has no existence. These provisions do not in express terms, or in their primary and principal purpose, contemplate such acquisition, but may under particular circumstances be regarded as sufficient authority. The constitution provides that the United States shall guarantee to every state in the union, a republican form of government; and shall protect each of them against invasion, and against domestic violence.† Congress has power to declare war, grant letters of marque and reprisals, and make rules concerning captures on land and water.‡ The president, by and with the advice and consent of the senate, two thirds of the senators present concurring, has power to make treaties.§ Congress is authorized “to make all laws which shall be necessary and proper for carrying into execution its express powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.”||

These provisions are in terms general. The means by which the invasion of a state may be resisted and repelled; the time when, and the purpose for which war shall be declared; the implements of warfare which may

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\* Madison Papers, vol. ii. pp. 1240, 1241; Ibid. vol. iii. p. 1456, *et seq.*; Story on Con. U. States, book 3, ch. 27, Abridgment.

† Constitution of U. States, art. iv. sec. 4.

‡ Ibid. art. i. sec. 8.

§ Ibid. art. ii. sec. 2.

|| Ibid. art. i. sec. 8.



be adopted ; the circumstances under which a treaty may be made ; the stipulations and provisions which may be inserted therein, are undefined, are left open to the discretion of those by whom they are to be used and adopted. They are not, however, without limit. They must be controlled by the purpose, by reference to other powers contained in the constitution, by the general policy and intent of the system of government, which the constitution has established.

The discretion to be exercised in these matters may well be designated a legal, and not an indefinite or capricious discretion. The principles of construction ordinarily applied in the ascertainment of the meaning of a private instrument, of the powers and duties of agents and of trustees, to which reference has been made, and illustrations have been given, are to be applied to the provisions which have been recited.

In the language of the supreme court of the United States, the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means ; and those who contend that it may not select any appropriate means, that any particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. The powers of government were intended to endure for ages to come, to be adapted to the various crises of human affairs. To have prescribed the means by which government should in all future time execute its powers, would have been to change entirely the character of the instrument. It would have been an unwise attempt to provide by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.\*

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\* *McCullock v. The State of Maryland*, 4 Wheat. Rep. 316.



These principles are applicable to a consideration of the authority, actual or supposed, of the federal government, to enlarge its territorial limits and sovereignty. A territory, foreign to the union, adjoining a state which belongs to it, may be inhabited by a race of people barbarous, uneducated, regardless of all law, human or divine.

Such people may make constant inroads upon the citizens and property of such state to an extent which, if continued, might produce its destruction.

In such case the federal government is competent to repel the invasion, and by its compact to preserve the integrity of the several states, would be bound to resist, to repel it, and prevent its recurrence.

A case of this description, of an urgent, of an extreme character, may arise, in which the preservation of a state of the union would require the conquest and subjection of an adjoining people, perfected by a cession, or by continued forcible possession of its territory. Under the circumstances supposed, the power and duty of the federal government is clear. If they are not, the government and its system are futile and useless.

Self-preservation is a law of nature, of individual man, and of society, but it is something more than, and distinct from, mere convenience or ordinary necessity. Another state of facts may be supposed for the purpose of illustration. A foreign government may have encroached upon our rights, disregarded our sovereignty, seized the ships and property of our citizens, in violation of the law of nations, not in a single instance only, not by accident, but by design, in repeated instances, and in disregard of objection and admonition on our part.

The United States would be entitled to an indemnity for such injuries, to a compensation for the wrong imposed. In such case, under such circumstances, it may

be fit and competent for the federal government to receive such indemnity, such compensation, by a cession of the territory, or of some portion of the territory of the party offending.

Other illustrations of the principle suggested will readily occur to those who examine and reflect upon the subject.

If the cession of Louisiana and of other territory which has been annexed to our domain was rightfully and constitutionally accepted; if additional territory and its sovereignty may be acquired by the federal government, it must be sustained under the treaty-making and war-making powers, or under one of them. These powers cannot constitutionally be applied for the mere purpose or pretext of such acquisition; but when legally and properly exercised, they may lead to such acquisition as an incident to, or result of, their rightful exercise.

No danger can be apprehended from the view which has been presented, because, as has been shown, the war-making and treaty-making powers are distinct, and operate as checks upon each other. They cannot be exercised so as to produce the acquisition of territory, without the concurring action of the executive and legislative departments.

The security, the interests of the country, cannot be destroyed or hazarded by the exercise of the authority under consideration, except by the corruption, incapacity, or want of fidelity of two departments, over which the people, through and by means of the executive franchise, have the ultimate power and control.

The treaty by which Louisiana was ceded to the United States, exhibits the force and effect of the limitations which are found to exist throughout our entire system of government. By this treaty it was stipulated, in behalf of the United States, that the inhabitants of the

ceded territory should be incorporated in the union of the United States, should be admitted so soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the mean time should be maintained and protected in the free enjoyment of their liberty, property, and the religion which they professed.\* Upon the ratification of the treaty, an act of congress was passed for the admission of a portion of it into the union as a state,† which could not have been accomplished by an unaided exercise of the treaty-making power. Territory has been acquired by the United States from some of the Indian tribes by purchase, uninfluenced by considerations similar to those which have operated, in the acquisition of territory, under other and different circumstances. Such acquisition from the original native inhabitants stands upon its own peculiar features.

The federal government, as assignee of and as successor to the title of the first discoverers, has always considered the fee-simple in the soil, the supreme sovereignty over the territory occupied by the Indians, as vested in itself, the Indians having the right of possession, of occupancy without the power of sale, to any purchaser, except the United States or some person buying under its consent and approbation. These acquisitions, therefore, are to be regarded merely as an extinguishment of an incumbrance upon the land, as the release in fact of a qualified interest, which the occupants had held as matter of grace and humanity, and not as an absolute right. By these purchases the United States acquire no additional sovereignty.

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\* Elliot, Diplomatic Code, vol. i. p. 110.

† Stat. at Large, U. S., vol. ii. pp. 245, 701.

The United States, in its quasi corporate capacity, may acquire the ownership of soil within its own jurisdiction, and I have no doubt without its jurisdiction, for forts, arsenals, storehouses, or other public purposes, excluding or admitting, as the case may be, certain qualified rights of a state, whenever the soil is within its limits.

The United States may also acquire, in payment of debts due to them, the ownership of soil. Purchases of this kind have been sustained upon principles and reasoning identical with those which have been suggested as applicable to the acquisition of foreign territory and of its sovereignty. In a recent case, the supreme court of the United States have said, "to deny to the United States the power to take security for a debt due to them according to the usual methods provided by law for that end, would deprive the government of a means of obtaining payment, often useful, and sometimes indispensably necessary. That such power exists, as an incident to the general right of sovereignty, and may be exercised by the proper department, if not prohibited by legislation, we consider settled by repeated adjudications. The United States being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts and take bonds, by way of security, in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department, when not prohibited by law, although not required to do so by any legislative act; and we think this same power extends to and includes taking security upon property for a debt already due.\*

It may be objected, that the acquisition of soil, as security, or in payment of a debt, is not the same as the

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\* *Neilson v. Lagow* and al. 12 How. Rep. 107, 108, and cases there cited.



acquisition of foreign territory, and of its sovereignty. Concede that the result in the two cases is not the same, but is more extensive in the one than in the other; It is equally true, that the powers by which the results are produced, are different, and are exercised for different purposes; each power is essential to the government.

The same principles of construction, the same general course of reasoning, in relation to the existence and exercise of these powers, may be applied and adopted, although when exercised they may lead to different results.

A debtor may be liable to arrest for a certain sum, or amount of indebtedment, and not liable for a less indebtedment. Whether he owes the one or the other amount, may be determined by the same or a similar course of proof, by the same or a similar principle of reasoning, without reference to the result.

In 1802, a convention between the United States and Spain was entered into, for the purpose of adjusting the several claims of citizens of the two countries upon each other, and upon their several governments. By a treaty between the same parties, made in 1819, East and West Florida were ceded to the United States, upon terms similar to those by which Louisiana had been ceded by France, and the claims of citizens of the United States upon Spain were relinquished. In a controversy growing out of this cession, and connected with rights resulting therefrom, the acquisition of foreign territory was a matter of discussion before the supreme court of the United States, which tribunal, in the course of its judgment, says, "the constitution confers absolutely on the government of the union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty." \*

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\* Elliot, Diplomatic Code, vol. i. pp. 411-417, 421; The American Ins. Co. v. Canter, 1 Peters, 542.



This language of the court may be relied upon as an authority, as an adjudication in favor of the power of the federal government, under the powers named, at any time, for any purpose, rightfully to acquire the possession and sovereignty of foreign territory.

It is evident, however, from an examination of the case, that the mind of the court was not directed to such an inquiry; it was not the intention of the court to establish or admit the existence of a power so extensive. An assumption in the federal government thus broad, cannot with propriety be regarded as well founded, or authorized by its system or its trusts.

In this and the preceding lecture, the principal matters which concern the external power of the federal government, as exhibited in its political intercourse with other nations, have been brought to your notice.

The external relations of any and of every country are delicate, are difficult of management; they assume frequently an attitude dangerous to the peace of one or more countries, for which reason they are, in many governments, intrusted to the direction of a single individual, or to a small number of persons.

In fact, the term *government* imports individuality, power, and authority; its use by ourselves, or by others, does not present to the mind a qualified impression deduced from a limitation upon its power and authority; this is the result of examination and reflection.

Although this individuality and unity of power, applied to others, applied externally, may be unobjectionable, it may result internally, in the destruction of civil right, of private interests, and in gross oppression. Our system is designed to prevent any such internal derangement, and at the same time to establish sufficient individuality and unity of power in the management of our foreign relations, to protect us from wrong, to uphold our rights as a nation.

The examination which I have made of the system, its machinery and operations, in the particulars to which reference has been made, is sufficient to show that the purpose has been accomplished.

The political character of the United States has also been shown. The character thus presented is worthy your study and attention, because you constitute a part of the power by which it has been established ; the people constitute the power by which alone it can be continued and upheld. From the study which I recommend, you will learn that our policy is domestic, is peaceful, is progressive. Our belief is, that every people has a right to establish, to regulate its own internal affairs ; that no other people or nation have or has a right to intermeddle therein. The efforts of the United States heretofore have been, to maintain good faith toward, and kindly relations with, all other nations.

The law of nations, the rights and duties of diplomatic agents, have been regarded, so far as they are consonant to reason, which is the foundation of all law.

The acquisition of territory for the purpose of extending the territory and sovereignty of the United States, does not constitute a primary or even secondary object of our union, and can be justified only under peculiar and extraordinary circumstances. Our mission is to govern ourselves ; to exhibit a light upon an eminence which others may see, and, if they will, may be improved by its reflection.



## LECTURE IV.

THE LEGISLATIVE DEPARTMENT OF THE FEDERAL GOVERNMENT.—IT IS SUPREME AND EXCLUSIVE OF STATE LEGISLATION.—THIS POSITION CONSIDERED AS APPLIED TO TAXES, COMMERCE, NATURALIZATION, BANKRUPTCIES, COUNTERFEITING THE PUBLIC SECURITIES.

IN a classification of the powers of government, the legislative or law-making power has precedence. The power of construction, of ascertaining the meaning of a law, the power of execution, of carrying a law into effect, are powers equally independent and essential; but these do not create or impose upon the citizen the obligations and restrictions under which he performs his duties as a member of society.

The legislative department is the most extensive in its operations, because it creates and imposes upon the citizen the restrictions and limitations under which his powers and capacities, physical, mental, and moral, are developed for his individual advantage and improvement, and for the advantage and improvement of those with whom he may be said to be in competition.

The science, the philosophy of our system, is peculiarly manifest in the construction of this department. It is more immediately, more directly dependent upon the power and will of the people, than is either of the other departments. The persons, the trustees who exercise the powers and trusts of this department, are more easily

reached, more frequently changed by the people. The law makers are no less operated upon by the vicissitudes of life, the changing course of human events, than are the people; they are a part of the people. They cannot, therefore, establish for themselves any distinct and exclusive immunities. They have the same personal interest in an honest adherence to the system, to the charter by which their powers and trusts are defined, as any other portion of the community has, or can have. During their continuance in office, they act under the restraint and limitations imposed by written constitutions. It cannot be said, in language often but erroneously applied to the British Parliament, that it is omnipotent; that its will, unlimited, is law. No such or similar extent of power is confided to the legislative department of the national or state governments, or to those who execute their trusts.

The legislative department of the federal government is, in its effect and operation, to a large extent, external; it is also internal. Its internal power is subsidiary to, and is designed to sustain and secure the external and foreign relations of the union, including, as part thereof, the intercourse of the several states and their citizens with each other. It is supreme in its action, whenever rightfully and constitutionally applied to the matters confided to the federal sovereignty. This supremacy is conceded by all who have discussed its powers. It is also exclusive. This has been doubted and denied. Upon this supposed exclusiveness of its power, a confusion has arisen, from a misuse and misapplication of the term "*concurrent*," from an apparent forgetfulness of the fact, that the adoption of the federal constitution did not operate a merger, or an extinguishment of the private rights of the citizen, or take away the sovereignty of the states. These remain, except to a limited extent, except so far as they are controlled, for the use of the federal government.



The exercise by the several states of powers similar to those exercised by the national government does not render them concurrent, and has no tendency to show that a particular power of the federal government is not exclusive. This exclusiveness of power, in many particulars and upon some subjects, has been universally conceded; in other particulars it has been resisted and rejected. A power cannot be supreme in a particular person, department, or government, which may be concurrently exercised by another independent person, department, or government. A concurrent power when once put in motion becomes exclusive, and continues until its purpose is accomplished, its force exhausted.

The term concurrent is ordinarily and correctly applied to judicial proceedings, to courts and other departments, or officers acting under the same sovereignty, and not to the action or powers of distinct, independent sovereignties.

In some estates, or titles connected with property, there are shifting or springing uses. But the existence of authority in an independent sovereignty is not shifting, springing, or casual, to be exercised or not at the pleasure of a different government; but it is permanent, and coextensive with the duration of the government in which the authority is found. The suggestion, that a statute or law of an independent sovereign state may be repealed, or that its obligation may be destroyed or suspended by a statute or law of a different jurisdiction, does not commend itself to the judgment. The power of a territorial or of a colonial government, may be diminished or enlarged by the sovereignty under and by which the one or the other is protected. The several states and the national government sustain no such relation to each other. They are clothed with similar powers, but not with the same. Whether a particular subject belongs to the one or to the other, independent of express provi-

sion, may be determined by reference to the duties and purposes for which they have severally been created. These, I doubt not, will afford the means of solution which any contingency may require. An ambassador cannot be received or refused by a state government, because his agency does not appertain to any business intrusted to a state.

An alien cannot be admitted to the benefits and privileges of an American citizen by state legislation. No one denies or doubts the principle involved, so far as it may be applied to these cases; but it is doubted and denied when applied to other subjects, more directly bearing upon the ordinary pursuits of life. In considering the extent and character of the legislative department, it must constantly be borne in mind, that it should be co-extensive, and in harmony with the system of government established by the constitution. If this has not been accomplished, the system is defective. The powers of this department are defined in the constitution, and they cannot be exercised by any state or state department. Congress has no power to transfer its jurisdiction, or its discretion, and no state has authority to assume the one or the other. An analysis of the legislative department will exhibit the purpose and capacity of the federal government, so far as they depend upon powers expressly granted. These powers are stated in article 1, section 8, of the constitution of the United States. Some of these powers relate to the incidents and implements of war, to the foreign relations of the country, and have already been brought to your consideration. In addition to such powers, congress has authority to lay and collect taxes, direct and indirect; to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies,

throughout the United States ; to coin money and regulate its value ; to provide for the punishment of counterfeiting the securities and current coin of the United States ; to establish post-offices and post-roads ; to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries ; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations ; to make all laws, which shall be necessary and proper for carrying into execution these powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. To render these powers available and secure from state interference, to accomplish the purpose of the union, the several states are prohibited from exercising, upon certain subjects, powers similar to those conferred upon the federal government ; in some other particulars, the states are absolutely prohibited from action. These prohibitions will be considered, when reference shall be made to the relation which the states bear to each other, and to the federal government. The powers which congress is authorized to exercise, and which have been recited, exhibit an intention to protect the several states and their citizens from foreign control or interference, to protect the states from each other, to protect the citizens in certain particulars from state legislation, to secure to the citizens of other countries such privileges as may be conceded to them by treaty stipulation, by law, or comity.

Some of these powers, by express provision of the constitution, must be so exercised as to produce throughout the United States, uniformity of action ; others, in relation to which no such provision is found, from their character and purpose, and upon principles which should regulate all legislative action, must be so exercised as to pro-

duce uniformity. The value of money coined under the authority of the United States, should be the same in every state. Authors and inventors should be protected, without reference to the state of which they may be citizens. In these cases, and in some others, uniformity is required, not by express provision, but by a natural fitness or necessity. Whether these powers are exclusive in the federal government or not, has been regarded as a matter or question, dependent upon the construction of each particular power considered by itself. This construction has not been uniform or consistent, but has changed from time to time. The result is, that some of these powers are now, so far as judicial authority is considered, to be regarded as exclusive in the federal government; others are to be regarded quasi concurrent in the states.

It is admitted that the power of congress, within the limit or jurisdiction conferred upon it, is supreme; that no state power can control or impede its exercise. Notwithstanding this admission, it has been said, and it has been adjudicated, that some of these powers may be exercised by the several states upon matters or particulars, in relation to which congress shall not have exercised its authority. In other words, that the legislative power of a state, in some particulars, is to be sought for, and is to be ascertained, by inquiring whether congress has or has not exercised its power over the same subject-matter. This is an extraordinary result, which may with propriety be regarded unnecessary, illogical, and well calculated to produce confusion and collision. The powers conferred upon the legislative department of the federal government, are essential to the system, and to the trusts created by it; otherwise such powers should not and would not have been conferred. In my view of the system, the powers of congress, to which reference has been



made, are supreme, and exclusive of state legislation. The several states may exercise similar powers for its own purposes, in all instances except those in relation to which the exercise of state authority is, by the express terms of the constitution of the United States, prohibited, or those, an exercise of which would be incompatible with the union, or with some trust or power confided to it.

Congress has power to lay and collect taxes. The several states have power to lay and collect taxes. These powers are not the same; they are similar powers, exercised by different governments, for different purposes; and as they may be imposed at the same time upon the same property or persons, one of the governments, by reason of the inability of the person, or insufficiency of the property taxed, may occasionally be unable to levy or obtain the amount of its assessment.

The power of taxation, which the two governments severally exercise, cannot be designated, in any appropriate use of the term, as concurrent. They are exclusive each of the other, to the extent to which the state has the power of taxation. The power of a state government to assess a tax upon subjects within its power of taxation, is not enlarged or diminished by the exercise of, or by the neglect to exercise, a similar power of taxation by the federal government. The correctness of this position in relation to taxes within the power of a state, has never been questioned; I refer to it as an illustration of the principle which should be applied to all other powers conferred upon the federal government. Congress has power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. The late Mr. Justice Story, in his commentaries upon the constitution, in discussing the question, whether the power to regulate commerce is exclusive of the same



power in the states, says, "It has been settled, upon the most solemn deliberation, that the power is exclusive in the government of the United States." \*

The power to regulate commerce is general and unlimited in its terms. The full power to regulate a particular subject implies the whole power, and leaves no residuum. A grant of the whole is incompatible with the existence of a right in another to any part of it. A grant of power to regulate, necessarily excludes the action of all others who would perform the same operation on the same thing. Regulation is designed to indicate the entire result. It produces an uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to have unbounded, as that on which it has operated.

The power to regulate commerce may be divided, may be distributed between, and may be exercised by, two sovereignties for different purposes.

The power of congress in laying taxes is not inconsistent with that of the states. Each may lay a tax on the same thing, on the same property, without interfering with the action of the other; for taxation is but taking small portions from the mass of property, which is susceptible of almost infinite division. In imposing taxes for state purposes, a state is not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the several states. Whenever each or either government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power which is

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\* Story on Con. U. S., Book 3, ch. 15, sections 516, 517, Abridgment.

granted to congress, and is doing the very thing which congress is authorized to do. When these suggestions were made by the author cited, they were true, and in accordance with the adjudications of the highest judicial tribunal known to the laws of the United States. A tribunal, the decisions of which have generally been distinguished for correctness and ability; the decisions of which must be respected, and must be regarded as conclusive upon all matters arising under the constitution or laws of the United States, howsoever they may differ from the judgment of any individual, or from the belief or opinion of the community. A reference to the decisions of this court, made since the commentary upon the constitution was written, will exhibit a different result. It must now be conceded, that these decisions sustain the right of the several states to regulate some matters of commerce not internal, provided congress shall not have exercised its authority in a manner to conflict with state legislation; a position, a theory, which I cannot doubt will ultimately be renounced. These recent adjudications seem to have been produced by a desire to uphold the power and authority of the state governments, so far as such power could, by any plausible course of reasoning be upheld, by an opinion well founded, perhaps, that some of the matters over which congress has power, may be regulated more conveniently by state legislation than by the legislation of the federal government.

These must be considered as unsafe and dangerous elements of reasoning. These adjudications have also, to some extent, been induced by giving too much force and effect to expressions used in a manner which may be regarded inaccurate and inappropriate. It has been often said, that the mere grant of power to congress does not imply a prohibition on the states to exercise the same

power.\* Here is a clear misuse of terms. It might have been said, that the mere grant of a power to congress does not imply a prohibition on the state to exercise a similar power. A power in the federal government to impose a tax for the purposes of the federal government, does not and cannot imply a prohibition on a state, so as to prevent the imposition of a state tax for state purposes. The authority of congress to lay and collect taxes for certain purposes, does not interfere with the power of the several states to tax for the support of their own governments; nor is the exercise of such power by the states an exercise of any portion of the power which is granted to the United States.†

In a case recently before the supreme court of the United States, in which the question under consideration was discussed, an able and accomplished member of the court (Mr. Justice Taney) regarded the power to regulate commerce between the several states as having the same force and effect as when applied to the regulation of commerce with foreign nations. In this respect, no difference of opinion has ever arisen; the powers are conferred in the same clause and by the same words; they are of the same character, inasmuch as commerce between the several states cannot be regarded as local or subject to state legislation, with any more appropriateness than can be the commerce with foreign nations. After conceding this, the learned judge proceeds to say, "the present is a case of commerce between two states, in relation to which congress has not exercised its power." The question, therefore, is, whether a state is prohibited by the constitution of the United States from making

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\* *Sturges v. Crowninshield*, 4 Wheat. Rep. 122.

† *Gibbons v. Ogden*, 9 Wheat. Rep. 1.

any regulations of foreign commerce, or of commerce with another state, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of congress. In other words, whether the grant of power is of itself a prohibition to the states, and renders all state laws upon the subject null and void. Although a difference of opinion exists between the members of the court, it seems to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states.

The controlling and supreme power over commerce with foreign nations and the several states is, undoubtedly, conferred upon congress. Yet the state may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory ; and such regulations are valid, unless they come in conflict with a law of congress.\* This supposed theory of our system is sustained and enforced by considerations derived from convenience, and from supposed usage in analogous cases. It is also supported by reference to the power conferred upon congress over the militia. In an earlier case the court had holden, that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia ; did not preclude the several states from legislating on the same subject, provided the law of the state was not repugnant to the law of congress.†

These cases are not analogous, and the power of con-

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\* The License Cases, 5 How. Rep. 578, 579.

† *Houston v. Moore*, 5 Wheat. Rep. 1.



gress over the militia and over commerce, cannot well be ascertained by any supposed relation between them. The militia is peculiarly a state institution, to be regulated in its general features by the several states. It cannot be considered as one of the implements by which the duties of the federal government are to be executed. The power of congress over the militia is in terms special and qualified.

Congress has power to call forth the militia to execute the laws of the union, to suppress insurrections, and repel invasions; to provide for their organization and government, when employed in the service of the United States, reserving to the states the appointment of its officers. The militia are to be relied upon only upon sudden emergencies; the safety of the union is to be secured by the army and navy, by forces created and controlled exclusively by congress, so far as such security depends upon force. Subsequent to the case to which reference has been made, the same subject was considered in a class of cases, called the passenger cases, in which the members of the court did not agree or unite in opinion or in judgment. So far as an examination of these cases afford the means of attaining a result, it would seem that a majority of the court considered the power of congress over commerce exclusive of any state legislation upon the same subject,\* thus returning apparently to the doctrine which Mr. Justice Story had regarded as well settled.

The matter has recently been before the court, and a majority have distinctly said, that the power of congress over commerce is not, in all particulars and in relation to all the regulations of commerce, to be regarded as exclusive of state power.

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\* The Passenger Cases, 7 How. Rep. 283.



In 1789, congress by statute provided, "that all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress." \* Subsequent to this act of congress, Pennsylvania by its statute of 29th March, 1803, enacted that every ship or vessel arriving from or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner, or consignee shall pay a sum equal to half pilotage. The validity of this statute of Pennsylvania was the matter to be adjudicated. The court entertained an opinion that the regulation of pilots, was to be regarded as a regulation of navigation, and therefore a regulation of commerce over which congress had the supreme authority; that the act of congress adopting the state laws existing at the time of its passage, made such laws by adoption laws of the United States, but did not operate to give effect to the laws of the states subsequently passed. The court, therefore, were brought directly and unavoidably to the consideration of the question, whether the mere grant of the commercial power to congress, was in itself a prohibition to the states of all power to regulate commerce, embracing within the term all matters to which the power of congress over commerce extended. The court held that a state by virtue of its own sovereign power might legally regulate pilots, so

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\* Stat. at Large, U. S., vol. i. pp. 53, 54, ch. ix. sec. 4.

long as congress neglected to exercise its power over the subject. This opinion proceeded mainly upon an assumption, that pilots and pilotage could be regulated by the several states more conveniently than by congress. The court at the same time expressly limiting the principles of its judgment to the case of pilots, intimating that the principle of that case would not be applied to other cases, to which its reasoning might be applicable.\* A minority of the court dissented, and one member gave the reasons of his dissent, which when read must be commended by him who reads. He says, "That a state may regulate foreign commerce, or commerce among the states, is a doctrine which has been advanced by individual judges of this court, but never before sanctioned by the decision of this court. In this case the power to regulate pilots, is admitted to belong to the commercial power of congress; and yet it is held, that a state, by virtue of its inherent power, may regulate the subject until such regulation shall be annulled by congress. This is the principle established by this decision. Its language is guarded, in order to apply the decision only to the case before the court. But such restrictions can never operate so as to render the principle inapplicable to other cases. The power is recognized in the state, because the object is more appropriate for state than federal action; and consequently it must be presumed, the constitution cannot have intended to inhibit state action. This is not a rule by which the constitution is to be construed."†

It will be found that the principle in this case, if carried out, will deeply affect the commercial prosperity of the country.

If a state has power to regulate foreign commerce, such regulation must be held valid, until congress shall

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\* *Cooley v. The Wardens of Philadelphia*, 12 How. 299.

† *Ibid.* p. 324. Mr. Justice McLean, dissenting opinion.

repeal or annul it. These views of the dissenting judge are in harmony with the system, which consists in the creation and symmetry of two distinct governments, each having its peculiar jurisdiction defined, and not dependent upon convenience, or the supposed indifference to and neglect by the one of its duty. If the sovereign legislative capacity of a state may depend in any one case upon convenience, it may be ascertained with equal propriety in all other cases, upon the same or a similar convenience. If the legislative power of a state is dependent upon the action or non-action of another government, it has no solid or secure foundation upon which to stand, and its constitution the source, and the only legitimate source of its power, may well be torn into pieces, and its fragments scattered to the wind. Upon this question may be examined and considered an able and interesting opinion of the late William Wirt, given when he was attorney-general of the United States. South Carolina passed a statute, by which it was enacted "that if any vessel shall come into any port or harbor of this state from any other state or foreign port, having on board free persons of color, such persons shall be liable to be seized and confined until the vessel sails, and the expenses of detention shall be paid by the master, and upon his refusal to pay, the persons so seized may be sold as absolute slaves."\* Under this law a person of color was seized from a British vessel, and upon application to the federal government the attorney-general advised, that the statute was unconstitutional and void. In this opinion the powers of the federal government and of the several states are stated with clearness and accuracy. It says, "By the national constitution, the power of regulating

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\* Elliot, Diplomatic Code, vol. ii. pp. 676, 677; Opinions of the Attorneys-General, vol. i. p. 659; Ibid. vol. ii. p. 426.

commerce with foreign nations and among the several states, is given to congress; and this power is from its nature exclusive. This power of regulating commerce is the power of prescribing the terms, on which the intercourse between foreign nations and the United States, and between the several states of the union, shall be carried on. No state can interdict a vessel which is about to enter her ports, in conformity with the laws of the United States, nor impose any restraint or embarrassment on such vessel, in consequence of her having entered in conformity with these laws." This opinion was not given in consequence of any supposed illegality or inhumanity exhibited in the purpose of the state statute, but because the state had no authority to say whether a vessel should be navigated in part or in whole by a particular class of persons. A subsequent attorney-general of eminent ability gave a different opinion, upon the ground, that the statute might be regarded and sustained as a mere police regulation. Upon principle, a state has the same power and authority to say, a vessel shall not be navigated by free persons of color, as it has to say, a vessel shall be navigated by a pilot appointed by the state. It can impose penalties in the one case, so well as it can in the other. In my judgment, a state cannot constitutionally do either. I have dwelt upon this subject somewhat at length, because I consider the question as of vital importance to the safety and harmonious action of our system. The internal commerce of a state, that which is carried on exclusively within its own territory and between its own citizens, or between persons temporarily domiciled or resident within its exclusive jurisdiction, may and must be regulated by state authority. Foreign commerce and commerce between the several states, in its nature is peculiarly the subject of the care and supervision of the federal government, and should be left with



all its parts, where it has been placed by the constitution. By this division of power between the two governments, each is supreme and exclusive of the other, in and within its prescribed limits, and no confusion or war of the political elements can exist.

Another power conferred upon congress is, to establish an uniform rule upon the subject of naturalization. This is an important power, and it must be considered as a power which could not well be vested in and with the several states. Aliens have no right to become citizens of a country to which they owe no allegiance, except as a matter of comity. Some writers hold, that a citizen cannot at his pleasure renounce his native allegiance. If this be so, the power of a government to extend such comity should be well guarded, and capable of efficient control.

An individual who enters a country other than his own, does so as matter of comity, expressed in legal enactments, or by the sovereign will, or by implication derived from the fact, that no restraining provision or policy has been adopted.

An alien, in our law, is a person born out of the jurisdiction of the United States.\* A person born without the territory of the United States, may have been born within its jurisdiction, and consequently be regarded as a citizen. An alien cannot acquire a title to real property by descent, or which is created by other mere operation of law. This is a well settled rule of the common law, and prevails, unless some statute or other competent authority shall have made a different provision. An alien may purchase land, or may take it by devise, subject to the right of the state to seize it, and divest his title, which, however acquired, must be regarded at common law as

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\* 2 Kent, Com. 5th edit., p. 50, *et seq.*



imperfect and defeasible. If an alien purchase land, at his decease it does not descend to his heirs, but vests immediately in the state. An alien, under the English law, may take a lease for years of a house for the purpose of trade. Probably in this country, a lease of a house to an alien for any purpose, would be regarded as valid between the parties to it, inasmuch as our system is not so severe as the common law of England has been upon this subject.

We are very much inclined, when inquiring what the law is, to ascertain what it should be, to learn whether this or that proposition has a logical foundation; whether it be conformable to certain supposed principles of right and wrong,—a mode of deduction of much value, but not always safe. An alien cannot exercise the right of suffrage, a privilege which constitutes the main pillar of our institutions, which is enjoyed by the American citizen to a greater extent than it is by the citizen of any other country. An alien, if permitted by comity to enter a country, is entitled to its protection in his person, his character, and in such property as the law of the country may permit him to hold.

The disabilities imposed upon aliens are designed to secure the integrity and welfare of the country by which they are imposed, to prevent the introduction of dangerous persons; of persons who, having acquired political or religious associations supposed to be objectionable, might not readily abandon them for those of their adopted country.

The title to land, when it became the subject of individual ownership, was regarded as conferring peculiar rights, and as giving to its possessor a control over the government, a political importance and influence not derived or acquired by the possession or ownership of movable property.

The disabilities of aliens were, therefore, established from considerations of state policy or necessity, as a means of self-preservation and protection, which every government has a right to claim for itself and for its citizens. As the great body of any community are more or less intelligent and educated, so these restrictions are more or less important and essential to the well-being of such community. It must be perceived, from this slight reference to the principles which all countries have applied to aliens, that the subject is one peculiarly appropriate to the federal government, so as to give uniformity and stability to such system as may be adopted. Nations have frequently entered into stipulations with each other, by which the respective citizens of each have been allowed to enjoy certain immunities in the country of the other, which they might not have had without such agreement. This exhibits the progress of society, and the constant enlargement, between civilized nations, of private right.

In a treaty made by the United States with Great Britain in 1783, it was agreed, "that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bonâ fide* debts heretofore contracted." It was provided, in the same treaty, that congress should recommend to the several states restitution of confiscated estates; that all persons should be allowed to go to any part or parts of any of the thirteen states, and therein to remain for twelve months unmolested in their endeavors to obtain restitution of their estates which had been confiscated.\* By a treaty with the same country, in 1794, the United States agreed to make compensation to British creditors for losses occa-

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\* Statutes at Large, U. States, vol. viii. p. 82.

sioned by legal impediments to the collection of debts contracted before the peace of 1783.\*

It was also provided that British subjects who had lands in the territories of the United States, and American citizens who held lands in the dominions of his majesty, should continue to hold them according to the nature and tenure of their respective estates and titles therein, and might grant, sell, or devise the same to whom they pleased, in like manner as if they were natives; and that neither they, nor their heirs or assigns, should, so far as may respect the said lands and the legal remedies thereto, be regarded as aliens.†

In a treaty with Spain in 1795, it was provided that the courts of each country should be open to the citizens of the other.‡ The policy of the United States, exhibited in its legislation in relation to aliens, has been liberal and enlarged. We are admonished to love our neighbor as as ourself; in the language of the law we are admonished to use our own privileges, so as not to destroy or impair the rights or reasonable expectations of others. In our negotiations with aliens, this admonition has been heeded to its full extent.

They are allowed, under the constitution and laws of the United States, to litigate with citizens in the courts of the United States. Aliens litigating with aliens have no standing in the courts of the United States, but must resort in such case to a state court. This exclusion of aliens, when litigating with each other from the courts of the United States, does not probably apply to some cases which may arise in a court of admiralty and maritime jurisdiction.

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\* Statutes at Large, U. States, vol. viii. p. 119.

† Ibid. p. 112.

‡ Ibid. p. 150.

This discrimination, which is made between litigation carried on between aliens and that which is carried on by an alien against a citizen, exhibits the object of our union, of the federal system, which is, as I have attempted thus far to show, protection from foreign aggression to ourselves, accompanied by a determination to give no just cause of offence to foreign nations, or to their citizens. Aliens are admitted to all the privileges of citizens, after a short residence, upon taking an oath of fealty. Difference of opinion as to the length of residence which should be required to entitle an alien to become a citizen, has always existed between persons who have considered it as a mere matter of state policy, uninfluenced by party considerations. Politicians have, no doubt, differed upon party considerations, and with reference to supposed temporary personal popularity ; with these last grounds of difference I have no concern. The principle which requires a residence, is deduced from the supposed inability of a stranger to understand, at a single glance of the eye, the peculiarity and nature of our institutions. A man may change, and put himself above and beyond all the influences and associations of his early life ; may throw off the habit of thought and action created by external influences. This change, however, is not the work of an hour or of a day ; it must be the result of time. This time cannot be ascertained with precision ; it is not susceptible of mathematical demonstration, but can only be approximated. A person coming from a country governed by a liberal constitutional government or system, can be assimilated to and with free institutions much easier and in less time than can be a person coming from an absolute government, as the former would not be subject to the same extent of change.

A discrimination, however, based upon the character or supposed character of the native country of an alien,



would be offensive and objectionable. An examination of the parties applying, with a view to ascertain in each individual case his fitness, as exhibited in his education or natural powers of mind, would be objectionable and impracticable. The period, therefore, which may be established as quarantine or probation must be arbitrary, and should be sufficient to enable the applicant for the privileges of a citizen to throw off his old garment and to put on the new. Another fact must always have influence in this matter. If the applications are few, the time of residence or probation which may be required, is comparatively unimportant, inasmuch as a single individual, in position like to a particle of the ocean, can do little to derange the surrounding mass. On the other hand, multitudes must be seen, and their influence felt for good or for evil. It is clear, therefore, that the time of residence should to some extent be measured by the number of those who may desire to renounce the protection of their father-land, by the adoption of a new home and its immunities. I proceed to inquire whether the power to admit aliens to the privileges which belong only to a citizen, is exclusive in the federal government. The provision of the constitution is, that the rule upon the subject shall be uniform throughout the United States. The several states have no means of exercising a joint power, have no authority which can operate beyond their respective territories, and consequently cannot establish the uniformity of action which the subject requires. The power is appropriate and essential to the federal government, by which all the foreign intercourse and relations of the country are controlled. The United States have contracted with the several states to protect them in the enjoyment of a republican form of government, to protect them against invasion.

Mr. Justice Story, in his commentaries upon the con-



stitution, says, it follows from the very nature of the power, that to be useful, it must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments (existing under the confederation) which the uniform rule of the constitution was designed to remedy. And accordingly, though there was a momentary hesitation, when the constitution first went into operation, whether the power might not still be exercised by the states subject only to the control of congress, so far as the legislation of the latter extended, as the supreme law; yet the power is now firmly established to be exclusive in congress.\* If this power be regarded as exclusive in congress, and it always, so far as I know, has been so regarded, no state can rightfully exercise any part of the power. If a state cannot remove all the disabilities of an alien, I see no ground upon which it can with propriety be said, that a state can remove any of the disabilities. It is the province of the federal government to provide for the naturalization of aliens, and as a consequence, to say upon whom and upon what conditions aliens shall be allowed to become citizens. This privilege may be conferred upon a few individuals, or it may be denied altogether. This power of reception and rejection cannot be concurrently exercised by two independent governments, exercising jurisdiction over the same territory. I have endeavored to state the character and condition of this power distinctly and intelligently, for the purpose of bringing to your notice a matter which has not been discussed with reference to the peculiarities of our system of government. An alien, at common law, cannot acquire a perfect and indefeasible title to land. An incapacity to hold a fee-simple is one of the disabilities of alienage. It is true, that at common

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\* Story on Con. U. States, book 3, ch. 16, sec. 538.

law an alien may hold land until the sovereign power within whose jurisdiction it is situate shall, by virtue of its sovereignty, seize upon it, and thereby divest the supposed title. In the language of the law, an alien may hold until office found; that is, until the sovereign power, by the institution of a suit, shall ascertain and declare the alienage. This has uniformly been regarded as the law of this country, sustained by repeated decisions.

Whenever suit has been or shall be instituted, to divest the title of an alien, it has been and must be by the state in which the land is situate, and not by the federal government. The land, in such case, becomes the property of the state, and not of the United States. It follows, therefore, assuming that an alien may enjoy this qualified right under our system, that the federal government cannot divest his title, or impose upon a state the obligation to do it, and therefore may be subject to inconveniences which it cannot overcome or counteract.

The principle which I wish to present for consideration, may be illustrated by a reference to the legislation of the several states. Many states have provided that aliens may hold land under certain limitations. Massachusetts and New Hampshire have provided by statute that aliens may hold land as effectually, to every intent, as a citizen may hold it, thus removing, so far as state legislation can remove, one of the disabilities of alienage. This legislation has been commended by Mr. Chancellor Kent as enlarged and liberal. It no doubt may be so regarded. It has been upheld by judicial decision. I am unable to perceive any principle upon which it can be sustained, without doing violence to our system. A grant of land by the sovereign authority does not confer upon the grantor the rights of a citizen, it does not ordinarily confer upon him the elective franchise; but such grant by the sovereign cannot be resumed by the power which con-

ferred it, unless a reservation to that intent be contained in the grant. A state having granted land to an alien, thereby by implication admits his capacity to hold, and is estopped to reclaim it by reason of the alienage of the grantee. In the constitution of one of the several states, it is provided, that "freeholders, and *all other inhabitants* having acquired a prescribed residence, shall be allowed to vote.\* If this state may rightfully confer upon an alien the capacity of a freeholder, an alien under the state constitution, without naturalization, (unless excluded by especial and doubtful constitutional legislation,) may become an elector in the federal government, may exercise the elective franchise, which would be a clear violation of our system, and a direct evasion of the exclusive power of congress to regulate and impose the terms and conditions upon which the benefits and privileges of a citizen may be conferred. If a state may allow an alien to hold land, to be exempt from any one of his disabilities, I see no ground upon which to say a state may not remove all his disabilities, and in fact may say, without reference to the federal government, who shall and who shall not enter its territory.

It is laid down by writers upon the law of nations,† "that the sovereign may forbid the entrance of his territory, either to foreigners in general or in particular classes, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state." "Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has no doubt a power to annex what conditions he pleases to the permission to enter." At the adoption of the constitution, the several states were sovereign, and each was

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\* Constitution of New Hampshire.

† Vattel, Law of Nations, book 2, ch. 7, sec. 94; and ch. 8, sec. 100.

lord of its territory, and might rightfully say who should enter, who should not, who might own land, who should be a citizen. Since the adoption of the federal constitution, the states have no foreign policy, no right to enter into compacts with foreign states, or to confer upon foreigners any political privileges or political exemptions. Upon this question, the present chief justice of the United States, (Mr. Taney,) in an opinion wherein he dissented from the judgment of the court, entertained different views, which he expressed with great force, in his accustomed clear and distinct language. He says, "it is clear upon principle and upon authority, that the several states have a right to remove from among their people, and to prevent from entering the state, any person, or class or description of persons, whom it may deem dangerous or injurious to the interests and welfare of its citizens; and that the state has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the federal government." \* In the same opinion it is conceded, "that the power to exclude persons cannot be concurrent; that the sovereignty, whether it belongs to the general or to the state government, which possesses the right, must in its exercise be altogether independent of the other." The views entertained by the chief justice, were not, apparently, adopted by the court, which conceded, that a state

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\* The Passenger Cases, 7 How. Rep. 466, 467. The language of the chief justice is broad and comprehensive. In considering its import, it should be borne in mind, that the foreign political relations of the country are confided exclusively to the federal jurisdiction, to the exercise of which successfully, an exclusion of aliens may be essential. It should also be remembered, that the safety of a state is not the only matter to be upheld and preserved. The safety of the United States embraces that of the several states, and is, therefore, more important and comprehensive. If the residence of an alien, or a class of aliens in general, is dangerous to the peace of the United States, the federal sovereignty may and must exclude him or them.



has a right to repel from her shores lunatics, idiots, criminals, or paupers, which any foreign country, or even one of her sister states, might endeavor to thrust upon her. This limited right has its foundation in the sacred law of self-defence, which no power granted to congress can restrain or annul.\* If a state may exercise an unlimited power of admitting or excluding any person, at its discretion, foreign consuls may be compelled to hold their places at the will of a state, and not by permission of the federal government, a position for which no one will contend.

In our treaties, as has already been stated, provision has been made, that certain aliens should not be despoiled of their land to which they should make claim, but should be allowed to retain the same, to the same extent as they might if they had been citizens. This provision, contained in our treaties, has been sustained as an undoubted exercise of rightful authority on the part of the federal government,† by many decisions of the supreme court of the United States. If the federal government may in one instance say, that an alien shall hold, or may hold land, it may say so in all cases, and no state can say the contrary.

If there is any one power, which from its character and purpose should be regarded as supreme and exclusive, in the federal sovereignty, it is the power or the powers which relate, or may relate, to the foreign relations of the country ; with these the several states have no occasion for the power. So far as I have been able to analyze our system, keeping in mind its great and paramount objects, I can find no warrant for saying, that a

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\* The Passenger Cases, 7 How. Rep. 457, Mr. Justice Wayne.

† Orr v. Hodgson, 4 Wheat. Rep. 453 ; Blight v. Rochester, 7 Wheat. Rep. 535.



state may authorize an alien to hold land, or in any other way may remove any one of his disabilities. I am unable to see how the power of naturalization, which has been conferred upon the federal government, can be enlarged or diminished by any state constitution or state law; such power must be regarded as supreme, as exclusive in the federal government, throughout all its immunities and its incidents.

The power to pass uniform laws upon the subject of bankruptcies, has been conferred upon congress. At the time of the adoption of the federal constitution, the several states were indebted to a large extent; the citizens were in a similar condition of indebtedness. Commerce was depressed, the internal trade and resources of the country were limited. This depression and embarrassment was more extensive in some than in other of the states. Jealousy and suspicion, no doubt, existed between them. Notwithstanding these difficulties, it was essential to the integrity of the proposed union, that public and private faith should be preserved, that public and private obligation should be performed. It was well known to those who framed the constitution, that new states were often inclined to shield their citizens, by the adoption of a system or series of stay or stop laws, by legislating for the benefit of debtors, to the injury and exclusion of the lawful rights of creditors. To obviate this possible state of things was one of the motives which induced the power to regulate bankruptcies. Another motive was, to provide for the unfortunate debtor, who, by accident or misadventure beyond his control, might be unable to perform his undertakings. Bankrupt laws were originally designed for the benefit of merchants, and not for persons engaged in other pursuits. The reason of the distinction is apparent and well founded, whether it be considered as a political or moral element.

The operations of merchants are extensive, require the employment of large sums of money and of credit, which must be exposed to perils and hazards, which no human foresight or integrity can guard against or prevent. In such cases, it is important to the citizen and his family, and to the community, that his shackles should be broken, so that he may resume his avocation, free from the depression which continued embarrassments might produce upon his physical and mental powers.

Those engaged in other pursuits are not exposed to similar hazards; by prudence and economy, which are essential to their welfare and to the character of the community, they may, generally, protect and provide for themselves. To induce them to do this, as a general principle, they should be held to a performance of their obligations, otherwise they may become indifferent and heedless of their own interests, and of the interests of those confided to their protection. Is this power exclusive in the federal government? The uniformity required, cannot be obtained by state legislation. If the question is to be determined by a mere reference to the language by which the power is conferred, no distinction can be made between this power and that of naturalization. The two powers are given in the same clause and in the same terms. Is the object the same? It may be said that the one, the power of naturalization, is foreign, and external in its character; that the other is internal, and therefore a difference of result may well exist. The power over bankruptcy, although it operates upon the people within the country, upon citizens, is undoubtedly in its principal element and purpose foreign and external. It was designed to prevent the several states from a course of legislation which might release its citizens from a performance of their obligations made with the citizens of foreign nations, from a performance of their

obligations made with the citizens of the other states of the union. It was designed to prevent the several states from passing laws, conferring upon their citizens a preference or immunity not conceded to the citizens of other states, which might be entitled, and should be entitled to protection. The power of bankruptcies became the subject of judicial discussion soon after the adoption of the constitution, and it was held, that the power of congress was supreme, but not exclusive. That the several states might pass bankrupt and insolvent laws, provided congress had not exercised its power, and even when congress had exercised the power, the several states might proceed with their laws, so far as they could legislate without producing any conflict with any provision or law of the United States. The state laws passed under this supposed power, however, by reason of a provision in the constitution which prohibits a state from passing any law which shall violate or impair the obligation of a contract, have been confined to their own citizens, to contracts made after the passage of the law, to contracts made between the citizens of the state by which the law may have been made, and therefore have had, and can have, only a limited operation. A state law cannot operate to release a debtor from an obligation contracted or entered into with a foreign citizen or with a citizen of another state, so that no effectual law of bankruptcy can be made, except by federal legislation. In the case in which it was held, that congress has not the exclusive power over bankruptcies, the opinion was maintained and sustained with great ability, and upon grounds of great plausibility, aided, no doubt, by a consideration of convenience. The late and most eminent chief justice says, "If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legisla-

tion on the subject must cease. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."\* In pronouncing this opinion, it cannot be doubted that the mind of the court was influenced to some extent by a supposed difference between insolvent and bankrupt statutes; the former, according to the generally received opinion, operating only to discharge the person from arrest, leaving his future property liable, whereas the latter, a bankrupt statute, discharges not only the person but the contract.

Mr. Justice Story, in his commentaries, accedes to this opinion as the law of the land, because it had been so decided. In his discussion, however, of the subject, it is evident that, independent of adjudication, he entertained a different view. He says, there are peculiar reasons, independent of general considerations, why the government of the United States should be intrusted with this power. They result from the importance of preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the states. It is obvious, that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its own local interests and pursuits. Under such circumstances, no uniformity of system or action can be expected. No state can introduce a system which shall extend beyond its own limits, and the persons who are subject to its jurisdiction. He adds, the power is important in regard to foreign countries, and to our commercial intercourse with them. The existence of the power is useful as a check upon undue legislation,

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\* *Sturges v. Crowninshield*, 4 Wheat. Rep. 414, 415.



and as a means of redressing any grievances sustained by foreigners in commercial transactions.\*

So far, the theory applied to many of the powers of the federal government, which authorizes the several states to act upon matters upon which congress may not have exercised its admitted power, has produced no serious practical evil or difficulty. I have no doubt it has been convenient. It cannot, however, fail to be seen, that it has elements which may and must, if carried out to its legitimate extent, produce evil and ultimate death to our system and its institutions. If a state may act in any particular case because congress has not acted, it may, upon the same principle and with the same propriety, act in all similar cases. Unless the powers of the two governments are to be sought for and ascertained in their constitutions, and nowhere else, they must be uncertain and undefined ; they should have certainty and precision, and by holding the powers of each government, as having life and vitality independent of the action of the other, this certainty and precision may be obtained ; each government will exercise its own power.

The several states may and will exercise powers similar to, but not the same with, those of the federal government, for their own purposes, so far and so far only as similar powers can be exercised without encroaching upon those confided to the federal government. Much to be preferred it is, that some purpose which in itself may be important, or some matter of convenience should fail of accomplishment, than that the symmetry of our system should be marred by the introduction of any dangerous or unsound principle or system of construction.

Another power of congress is that of providing for the punishment of counterfeiting the public securities.

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\* Story on Con. U. States, book 3, ch. 16, sections 540, 545.



In former times, tampering with the coin of the king was regarded as treason, and punishable by death. The severity of the punishment cannot at the present time be doubted. The principle which dictated it, although carried to an extreme, cannot be denied. Government must be sustained and upheld, and it must, therefore, provide for its own security, for the integrity and safety of the implements by which its functions and purposes are to be performed. If the public securities can easily and without danger be counterfeited, their value and ability to accomplish the purpose and duty of government will be defeated. To avoid an evil of this description, every government must be clothed with authority to protect itself, and the agent or agencies by which its trusts are to be performed.

Counterfeiting a public security, or tampering with the coin or securities of a country, is more disastrous in its consequences than possibly can be the counterfeiting or tampering with a private contract or security. In the one case, the evil falls upon the public, upon the community, as a society ; in the other, it produces wrong and injury only to private right, and is not so extensive in its influence. As to the extent and character of the power under consideration, no difference of opinion has ever arisen. It is, in its nature and purpose, exclusive in the federal government. It cannot be otherwise, inasmuch as every government must be the exclusive judge of offences against itself. One government cannot well undertake to punish for wrongs done to another. The state authority can provide and does provide in this particular for itself. It exercises, not the same, but a power similar to one exercised by the federal government. The powers of the two governments upon this subject are confined each within its own province, and no collision or difficulty can be suggested.

This power exhibits distinctly the true theory of our system.

It shows the existence of similar powers, exercised for and with a similar intent, in two, not the same distinct governments, each acting for itself, uninfluenced and controlled by the action of the other, each responsible for its own fidelity, neither amenable to censure for the neglect or inability of the other to discharge its trusts.

## LECTURE V.

THE LEGISLATIVE DEPARTMENT OF THE FEDERAL GOVERNMENT.—IT IS SUPREME, AND EXCLUSIVE OF STATE LEGISLATION.—THIS POSITION CONSIDERED AS APPLIED TO “POST-OFFICES AND POST-ROADS;”—“THE PROGRESS OF SCIENCE AND USEFUL ARTS;”—“OFFENCES AGAINST THE LAW OF NATIONS.”—RESTRICTIONS UPON THE LEGISLATIVE DEPARTMENT.

THE power to establish post-offices and post-roads is conferred upon congress. It does not apparently furnish many suggestions of a political or scientific character. It seems to be a mere matter of business, which might conveniently be managed by the several states, each acting within its own territory, or, under certain legal regulations to prevent monopoly and exorbitant postage, it might be left to individual enterprise. Those who framed the constitution entertained a more enlarged view of the subject, and regarded it as a matter of national concern and interest.

The duties to be performed under this power, and the benefits resulting therefrom, are not in their nature local, or more applicable to any one state than to any other. When the constitution was presented to the people for their adoption and ratification, this power attracted very little notice or comment. It was not resisted or approved to any considerable extent. The writers of the *Federalist*, whose influence in favor of the adoption of our system was undoubtedly of great importance, passed over

the subject by a mere reference, accompanied by a passing observation as to the propriety of delegating its control to the federal government. It has been suggested that the government is only authorized to select the roads over which the mails shall be transported, and to designate the places at which post-offices shall be located. This limited construction has never been adopted, has not been sanctioned by any considerable number of persons, or supported by any plausible course of reasoning. It must, therefore, be considered as practically settled, that the entire subject, with all its incidents, has been confided to the action of the federal government. In 1806, under this power, congress undertook to lay out and establish a road from Cumberland, in the state of Maryland, to the state of Ohio, which was subsequently extended beyond its original limit. This exercise of the power has been the subject of much discussion, and of considerable political excitement. The original act provided for the assent of the states through which the road was to be constructed, a provision well calculated to allay any excitement, to prevent any resistance, which at the time might otherwise have arisen; a course of legislation, however, which is not to be commended. If congress has a constitutional power to establish a road through one or more state or states, it is a power not dependent upon the will of the states, and should be exercised upon the sole responsibility of the government which has the power. The federal government has a right to take private property for its public functions, to the same extent and upon the same principle upon which the several state sovereignties take private property.

If congress has not power within itself to construct a road, or embark in any other enterprise, the road or the enterprise should be left to some other power which may

have the authority. Heretofore this exactness and precision has not been of urgent and unyielding necessity ; but the importance of precision and exactness in the execution of every power contained in our system, composed of distinct sovereignties, is becoming more visible and apparent every hour. A government which shall exercise any of its powers by the consent or at the will of another government, will find it difficult to resume them, and may ultimately lose all its powers. The true and the only safe theory of our system is, that neither the national or the state sovereignty should usurp or exercise a power not its own ; that neither should shrink from a performance of its duty, or from the exercise of its constitutional authority, leaving the result and the consequences to take care of themselves. The assumption, as has already been stated, in which our system had its origin, depends upon the integrity and intelligence of the people. This can be improved and sustained by the intercourse of mind with mind, by an exchange of its attainments. This is generally understood and conceded. It is essential to every class of the community ; and there is no difference in the nature of the result which is produced upon those of little or no education, and upon those of more extended study and information. Every individual who visits for the first time a distant or neighboring place or community, carries with him, in his own opinion, a portion of the character, dignity, and importance which he is accustomed, or which others are accustomed, to ascribe to the place and its inhabitants from which he goes. Almost instantly upon his arrival, he discovers many things, hears modes of expression, perceives habits of life, which to his mind, in his judgment, are objectionable, useless, or pernicious. Soon the scales fall off, and he learns that he left at home peculiarities not less objectionable than are those by which he is surrounded. He returns qualified



to aid in the correction of his own defects, and improved by the acquisition of some thought, of some knowledge, which he had not previously had or attained. He returns also with a more favorable opinion of the people with which he may have associated, and is more competent and more willing to determine accurately in relation to their conduct and motives. His mental vision, his judgment, becomes enlarged. The facility of correspondence and intercourse which is promoted by the establishment of post-offices and post-roads, must therefore be regarded as an important means of creating and of maintaining a knowledge of, and respect for, those who, although distant from ourselves, and having local interests diverse, and possibly adverse in a limited sense to our interests, are nevertheless bound by the same institutions, by the same general fundamental principles of political economy by which we are bound and protected. In this way our union will not depend exclusively upon a declaration engrossed upon parchment, but will find its chief support in our affections and in our judgment.

The purpose of government, the conduct and management of its operations, are accomplished by the facility of intercourse which is furnished by an exercise of the power under consideration. These suggestions are sufficient to show that the establishment of post-offices and post-roads is not to be regarded merely as an ordinary convenient business matter, but as one of the principal implements by which our institutions are to be upheld, improved, and rendered available in the promotion of civilization and of freedom. It must also be seen, that the federal government is the most appropriate sovereignty by which the power of establishing post-offices and post-roads should be exercised and controlled. If the power had been intrusted to the several states, great embarrassment might and no doubt would have arisen.

As it now is, no state can exclude from transportation by the mail any matter or thing which the federal government may think reasonable or proper to admit. Some of those who have discussed the constitution of the United States, and the form of government upheld by it, have maintained that the power over post-offices and post-roads is concurrent in the several states, and may be exercised by them in subordination to the power of congress. This is sustained upon the assumption, that the states are not prohibited from its exercise; that there is nothing in the power or its subject-matter, which may not be exercised by both governments at the same time, without prejudice or interference.

If this be the true exposition, the states may establish a post-road, or post-office within its own territory, where-soever congress has omitted to establish any.\* This would not be convenient to the people of the country as a whole, and might render the means of communication more uncertain and more expensive. It is a matter of fact, that some governments have assumed to open supposed suspicious correspondence,—a power not to be justified in its exercise unless, and only in extreme cases, where the safety and integrity of the government and its existence might be endangered by a neglect of its exercise.

If this supposed right of supervision is, under any circumstances, to be exercised, it should most certainly be under the authority of the federal government, which is charged with all the foreign relations of the country, and also with a duty to uphold its own integrity, and the republican form of government of the several states. All the reasoning which may be used to show the fitness and even necessity of uniformity of action, applies to

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\* Story on Con. U. States, book 3, ch. 18, sec. 556.

this power with great force. No state has undertaken to establish post-offices and post-roads, and probably may not make the attempt; and no state can undertake to supervise, or in any manner control those established by the federal government.

Another power conferred upon congress was and is designed "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." No such or similar provision was contained in the articles of confederation, by which the several states, before the adoption of the constitution, were to some extent regulated in their fortunes and in their intercourse with each other. The several states passed laws upon this subject to suit themselves. When these articles were abandoned for a more perfect union, the power to encourage the advancement of the arts and sciences was conferred upon congress without objection. It could not be made effectual, for the protection and benefit of individual authors and inventors, by the several states as independent sovereignties. The propriety of the power, and of its enlarged and liberal exercise, cannot be doubted. Individuals cannot devote their time and lives to the attainment of extensive or important knowledge, unless they can derive some personal benefit from their labor. In every useful invention, in the production of useful writings, the public have as much, and frequently a greater interest than the individual inventor or writer can have. Every measure which can with propriety be adopted to enlarge and extend the progress of science and of the arts, is calculated to accomplish the elevation of the people, and must therefore be regarded as of the utmost importance. The effect of our system, and the encouragement which it affords to the promotion of knowledge, has been apparent. Much advancement has been made,

in fact it may be regarded as characteristic, and may be said of the American people, that they are progressive, inventive, and suggestive, in all their operations. Their indifference to, and disregard of, ancient landmarks, well in itself when cultivated in moderation, has occasionally produced more haste and rapidity than progress. A striking and peculiar difference in the matter of science, of art, and of knowledge in general upon all subjects, exists between our country and many other civilized nations. With few individual and prominent exceptions, we do not boast of the number of our eminently learned and able men, standing as it were upon a pedestal, far above their surrounding fellow-citizens. In many other countries, some few are found occupying such elevated positions. In this country, knowledge is generally diffused; the entire population have access to the sources of knowledge. Public schools are established and supported in many states at the public expense, which are open to all who are willing to accept the benefits which may be derived therefrom. Academies, private literary institutions, and colleges are abundant, so that every American citizen, and every resident, although not a citizen, may easily obtain all the knowledge which his situation may require, or which his ambition may induce him to attain. The result of this provision for the maintenance of an intelligent, well educated people, is manifest in all the relations of life even to a casual observer, and it may, in truth, be said, that the people of this country have acquired, as a whole, more learning and information than any other population of equal number can exhibit. The cause of this diversity or peculiarity, deducible from a comparison with other countries, is obvious. In this country, few individuals can afford the money or time requisite to acquire any more knowledge than their daily pursuits require; they cannot devote an entire life to the



acquisition of knowledge merely and solely for the sake of its attainment. They must use their capital, mental, pecuniary, and physical, for their support, and for the education and improvement of their families. Knowledge in this country is, as a distinguishing feature, substantial and practical in its results.

Although our individual knowledge may not be so enlarged upon any particular subject, such as we have extends to a great variety of subjects. We know something upon almost every subject. This arises from the necessity imposed upon every individual to keep himself, so near as may be, upon equal ground with his neighbor, to understand to some extent the science of government and the practical working of our political system, so as to discharge with fidelity his duty as one of the people, who are the source of power, and the object of its protecting influence. This diversity of knowledge is not only required by, but is a result of, our institutions. It may be illustrated by reference to the legal profession. In England, the lawyer devotes himself almost entirely and exclusively to the acquisition of a knowledge, and to the exercise of some particular branch or department of legal science, — selecting that which may harmonize with his peculiar habit of mind. Not so in this country, in which a lawyer is supposed to know so much of any and every department as he does of any other of legal science; thus extending his knowledge and practice to every branch of his profession. The power of congress to promote science and art is in no sense local, or more applicable to any one of the several states than to any other; the object designed to be accomplished by it, is important, and essential alike to every state and to every section of the country; uniformity of protection to the author and to the inventor is also desirable. This uniformity cannot be attained by state legislation. The authority of



congress over this subject, so far as I know, has always been regarded as exclusive, and over which no concurrent power has been claimed in behalf of the several states.

Another power of congress is, to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. This power is of an important character; the peace and welfare of the country depend much upon the fidelity and firmness with which it is executed. It is supreme in the federal government, and in its character and purpose must be exclusive, upon the broad principle, that a state government cannot exercise its authority beyond its own jurisdiction. Since the adoption of the federal constitution, any and every power of the several states over piracies or felonies upon the high seas, has been merged or transferred to the federal government. Offences against the law of nations constitute no part of the criminal code of the several states, are not the subject of state control or interference. Every ship which is owned by a citizen or citizens of the United States, which rightfully sails under its flag, upon the high seas, is within the jurisdiction of the federal government, and not within the jurisdiction of the individual state of which the owner or owners may be citizens. Offences which may be committed on board such ship are amenable to the legislation of congress; any insult or injury done to such ship, by the authority and under the direction of a foreign government, is an insult and injury to the national government, and their prevention, remedy, and redress, are to be sought for and to be had by the sovereignty invaded. Offences of a piratical and felonious character upon such ship, upon property or persons on board, are punished by the government whose citizens and property have been assailed,

or, in the case of certain offences, which are regarded as being against the peace and security of all nations alike, they may be punished by any government within whose territory they may be found, because they are regarded as a violation of the safety and security which every nation concedes to every other, and because every nation has an equal interest in their prevention and suppression. Piratical and felonious offences upon the high seas, have been the subject of legislation by the congress of the United States from the commencement of its jurisdiction or sovereignty. This legislation has been firm and severe in its penalties, and has been carried into effect under every reasonable safeguard, which the protection of the innocent or the punishment of the wrong-doer requires. More than this, in 1820 congress, under severe penalties, made the slave-trade carried on by its citizens piracy, and thus in advance of other nations did much to diminish the evil of this odious traffic. By the statute referred to it is provided, "that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave-trade, or any person whatever being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and on any foreign shore seize any negro or mulatto not held to service or labor by the laws of either the United States, or *territories* of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate; and on conviction thereof, before the circuit court of the United States for the district wherein he may be brought

or found, shall suffer death.”\* So early as 1794, congress prohibited the carrying on the slave-trade from the United States to any foreign place or country.† And from that early period to the present, efforts have been made by legislation to prevent the trade. The statute of 1820 confines its penalties to American citizens, and excepts any interference with slavery so far as it is recognized by the constitution of the United States. It is conceded by writers upon international law, that slavery is a violation of the law of nature ; that all men by nature are born free ; but it is not regarded as a violation of the law of nations. It is said to be a matter of municipal regulation, and is controlled by every nation, in accordance with its own sense of right and wrong, and not to be controlled by any other nation. So far as this principle operates to prohibit a nation from interfering with the internal affairs of another, it is undoubtedly sound, inasmuch as the morals of every nation, when exhibited only within its own territory, are matters peculiarly appertaining to itself. When, however, a nation permits its ships or citizens to encroach upon territory over which it has no jurisdiction, and to engage in the slave-trade, it cannot well complain, if other nations regard it as no less objectionable than are those acts which are regarded as offences against every nation.

Piracies and felonies upon the high seas operate in their consequences mainly upon individuals and individual rights, and are not considered so extensive and injurious as are offences against the law of nations.

The principal offences against the law of nations which are cognizable by judicial tribunals, are :— *First*. Offences against ambassadors, which have already been

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\* Stat. at Large, U. S., vol. iii. pp. 600, 601 ; May 15, 1820.

† Ibid. vol. i. p. 347 ; March 22, 1794.

referred to in the suggestions made in relation to the rights of diplomatic agents. *Second.* A violation of safe conduct. *Third.* Libels against sovereign princes and eminent persons in foreign states. *Fourth.* Piracy.\* A safe conduct is either express or implied. Express safe conducts have been given only in time of war. All foreigners, who are in the territories of any state in time of peace, are there under an implied safe conduct. During the continuance of safe conduct, either express or implied, a foreigner is under the protection of the sovereign; and if any violation of his rights, either in person or property, be not punished by the sovereign, it becomes just ground of war. It is provided, by a law of the United States, that if any person shall violate any safe conduct or passport granted under the authority of the United States, he shall, on conviction, be punished by imprisonment not exceeding three years, and be fined at the discretion of the court. That the United States may grant a safe conduct in time of peace or war, would seem to be a matter perfectly plain and clear; and that this power cannot be exercised safely by the several states, because they cannot be presumed to know the condition of the foreign relations of the country so fully and accurately as the federal government is required to know them. The policy in this particular of the general government cannot be anticipated by state authority. Whether a safe conduct, retrospective in its operation, can be given under the authority of the federal government, which shall be regarded as a protection and immunity to the holder, for acts by him previously done, is undoubtedly a question of grave import and of difficulty. Under some circumstances, I have no doubt, it may, in the

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\* Wildman, Law of Nations, vol. i. p. 199, *et seq.*



exercise of its admitted sovereignty, grant such protection.

The federal government cannot release an individual from the consequences of an offence against an individual state, which in its character and consequence is merely and exclusively local and confined to the state. Equally true it is, that the federal government, through its executive, has power to release offences against the nation. Whenever an individual, a citizen of a foreign government, shall do an act by the direction and authority of his sovereign which may be an offence against a state law, it may be for the interest of the country, of the United States, to require from such foreign sovereign the proper indemnity, and at the same time to permit and require the individual, under a safe conduct, to leave the territory of the United States. A case of this description occurred in connection with the Navy Island transaction, which is familiar to you. Persons, some of whom were undoubtedly American citizens, were engaged in an unlawful enterprise against a neighboring province, which resulted in an encroachment upon the territory of the United States and upon its sovereignty by a destruction of the steamboat *Caroline*, within the jurisdiction of the United States; an act altogether inexcusable, upon the ground that a nation can only exercise the right of war upon its own territory, or upon that of its enemy, or in one which is vacant or common to all the world. No nation can rightfully pursue its enemy upon neutral ground. Amos Durfee, an American citizen, on board the *Caroline*, was killed, and Alexander McLeod was indicted in a state court of New York for his supposed murder. The act of McLeod was approved and adopted by the British government, and his surrender demanded. Mr. Fox, in behalf of the British government, addressed the then secretary of state upon the sub-



ject, and said, "the grounds upon which the British government make this demand upon the government of the United States, are these: that the transaction, on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her majesty's colonial authorities, to take any steps and to do any acts which might be necessary for the defence of her majesty's territories, and for the protection of her majesty's subjects; and that consequently those subjects of her majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

The American government, inclined to yield to this demand, inclined to surrender the party accused, holding his sovereign responsible, found itself embarrassed by the peculiarity of our system. The facts presented a case apparently beyond the control of the federal government, acting independent of, and without the concurrence of the state authority. Fears were entertained by portions of the community, that a controversy with Great Britain might arise. If the territory of one of the several states is invaded by a foreign power, or by the authority of such power, or by persons acting under color of such authority, whose conduct is subsequently approved and adopted by the assumed principal, it is the duty of the United States to repel, and to redress the injury; although done upon the territory of a particular state, it is a violation of, and an attack upon, the sovereignty of the United States. The federal government should, therefore, have the power which such an exigency may require. The several states, by conferring upon the federal government, through the instrumentality of their citizens, the

people, the management of the foreign relations of the country, have conferred authority sufficient to execute and uphold the trust. And I have no doubt that the federal government might rightfully have conferred upon McLeod a safe conduct, which the state judiciary should and would have respected; if it had not, the judiciary of the United States could and would have given effect to the immunity conferred upon the party accused. The government of Great Britain having adopted the act of McLeod as an act for which it held itself responsible, it was competent for the government of the United States, through its executive councils, to accept or reject this adoption, and at its election to hold the individual, or the government which had adopted his act, as responsible. It may have been essential to the peace and security of the country, that the United States should accept the proffered adoption. Such an event would defeat, would be inconsistent with the purpose of our system, if the United States could not execute the power of conferring upon the individual a status, or position, which would shield him from state control. Whenever the executive recognize a particular individual as the ambassador of a foreign government, every tribunal, state and national, is bound to accede to the individual the protection which, by the law of nations, is appropriate to his station, and the ambassador may plead his station as a protection from state power. The recurrence of a similar case has been provided for by statute.\* In 1842, a statute was passed by congress, which provides "that either of the justices of the supreme court of the United States, or judge of any district court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law, shall have

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\* Statutes at Large, United States, vol. v. p. 539.

power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail, or confinement, where he or they, being subjects or citizens of a foreign state and domiciled therein, shall be committed or confined, or in custody under or by any authority or law or process founded thereon, of the United States or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission or order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And if upon return of the process and a hearing thereon, it shall appear that the prisoner is entitled to be discharged from such confinement, commitment, custody, or arrest, for or by reason of such alleged right, title, or authority, privileges, protection, or exemption, so set up and claimed, and the law of nations applicable thereto, and that the same exists in fact, and has been duly proved to the said justice or judge, then it shall be the duty of the said justice or judge forthwith to discharge such prisoner.

This statute is no doubt a constitutional exercise of the power of congress, and affords an easy remedy to the parties who may come within its provisions, but it cannot be regarded as the creation of a new right, or as taking away the power of the several states, or as adding to the powers of the federal government. It cannot be regarded as conferring upon an individual who may be entitled to receive the protection of the statute, any new or additional right. Privileges and immunities conceded to an individual by the law of nations, do not proceed from, or depend for their efficacy upon, the legislation of any individual country. They depend upon the assent and recognition of those nations which consider themselves bound by the law of nations. The inability or incapacity of a nation,

by reason of its peculiar system or internal construction, to uphold such rights, does not and cannot furnish an excuse or justification for the violation or disregard of the rights of an individual, which the law of nations may have conferred upon him. It is upon this ground, independent of the statute to which reference has been made, that the federal government, as I have suggested, through its executive power, and the aid of its judiciary, might and should, in its discretion, have released McLeod from the consequences of an act which his sovereign had assumed.\*

Another prominent class of offences, for the prevention and suppression of which the law of nations has regard, is that of libels against sovereign princes and eminent persons in foreign states. So far as I am aware, no legislation has been had by congress, to provide for the ascertainment and for the punishment of this class of offences. It is a matter exclusively within the power of the federal government. Notwithstanding the unlimited freedom of the press which has been indulged in this country, and carried frequently even to an excess derogatory to the intelligence and character of the people, and to our institutions, no serious difficulty from such excess has oc-

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\* The judiciary of a state cannot be forcibly resisted or despoiled of its right to retain and exercise its jurisdiction, when it shall have attached. This is a general principle, applicable to all judicial tribunals, and especially is it applicable to the state and national judiciaries, acting under different sovereignties. Whenever a party sets up a right or title under a treaty, or law of the United States, such party, under certain regulations, has a right to resort to the judiciary of the United States. This right is made available by appeal, or by a transfer from a state court to a court of the United States, or by a writ of error, from the supreme court of the United States to the state court. The statute referred to must be regarded as providing a mode of transfer, by *habeas corpus*, of a party from a court of one jurisdiction to that of the other, not upon any ground of supremacy which one court has over the other, but upon the title of the party impleaded. The statute cannot be sustained, as a constitutional provision, upon any other hypothesis.



curred in our relations with foreign countries. It must be admitted, however, that difficulty may arise from this source, inasmuch as every nation is properly mindful of the character and respect due to its government, its sovereign princes, and to its eminent public men. Every individual regards the opinion of his neighbors, in relation to himself, as of considerable importance. The law of every country, where law is regarded as the standard of right, protects its citizens from libels. This protection is due to them, and is also due and essential to the safety and well being of the public, of the community as a whole; the peace and repose of society cannot be sustained without such protection. Equally important it is to nations, that their intercourse with each other should be courteous and respectful. In vain would it be, for a nation to admit it has no right to interfere in the internal or domestic affairs of another nation, if it may, through the press and the language of its people, assail the sovereign, or those who stand high in the public stations or in the affections of such foreign nation. The people of a country always cherish the reputation and the acts of its eminent men, as they cherish the land of their birth. More than this, the people of every civilized country cherish and respect the reputation and character of the great, the good, and the learned men of other countries, as an important and valuable example to themselves. The results which follow from a cultivation of science, from the acquisition of art, the labor and investigations of the learned, are not and cannot be confined within territorial limits. The name and memory of Washington and of his acts, are regarded in other countries with an intensity of admiration, which compares favorably with the sentiments and emotions with which his name is associated in every hamlet and in every house within the limits of his and of our country. Contributions from



abroad, have been made to the monument which his countrymen propose to erect in commemoration of his virtues. The law of nations, which is mindful of the respect due to foreign princes and to foreign eminent persons, rests upon an enlarged, liberal, and cultivated state of morals, of manners, and of society; and, although no statute has been passed to carry the principle of the law into effect, it has been regarded, with some few unimportant ebullitions of temporary passion not approved or indulged in by the mass of the people, and has been enforced by the self-respect of the people, and thereby our civilization, and the effect of our liberal and free institutions, have been made manifest.

I shall call your attention, in few words, to another offence against the law of nations, that of piracy. Upon this subject, the legislation of congress has been constant and abundant, from the commencement of the federal government. The propriety of guarding, so far as may be, against this offence, is universally conceded. As has been before said, the slave-trade was made piracy by a law of the United States, when carried on by its own citizens, in advance of similar legislation by other countries. American ships engaged in the trade are subject to condemnation and forfeiture. In addition to the provisions applicable to this subject, the legislation of congress is replete with provisions designed to prevent individual and unauthorized inroads or invasions upon other nations, with which the United States are at peace. Resort has, on several recent occasions, been had to these provisions, and more than once, for the purpose of suppressing and punishing such individuals as may have engaged therein. The success of these efforts has not been such as might have been expected. American citizens, enjoying every freedom which is compatible with the safety of free institutions, naturally desire that their

supposed freedom from oppression may be extended to the people of every other land. The oppressed of every country find in the American heart a sympathy which, unless chastened and guarded, may defeat itself, may subvert its purpose, and may ultimately become the means of our own destruction. It is no part of our mission or duty to extend our freedom, our civilization, our institutions, or our religion, by a disregard of the rights of others, or by a destruction of the institutions of other countries, that our institutions may be erected upon their ruins. In this respect, public opinion as a whole, and the influence derived therefrom, has been in favor of justice and of right; has been in favor of extending our principles, not by force, not by invasion, but by the purity and fidelity with which we exhibit in and by our example and conduct, the power and capacity of free institutions, and their adaptation to all the wants, physical, mental, and moral, of a well educated people. The several powers of the federal government have been referred to; they have been stated and discussed, so far as is necessary to exhibit their general features, and the purpose designed to be accomplished. These powers are adapted to the end sought, and they show most distinctly the knowledge and appreciation of political economy which was enjoyed by those who matured our system. Political economy is not and cannot rightfully be regarded as an exact science, applicable in the same terms to every country and to every people. The purpose which it is designed to accomplish, whenever and wherever it may be applied, is the same. Its object is to uphold society, to sustain and maintain inviolate the institutions of government, of society. It will readily be perceived, that an absolute government, one which exists by its own power, and which regards no will except its own, must be controlled by machinery and by implements not essential to

a liberal and free government, which acts through the instrumentality, more or less immediate, of the people. It must also be perceived, that liberal institutions are not and cannot be adapted to the condition of every people. The climate is not the same in every country, the products of the earth are diverse, and must receive each its own peculiar culture, otherwise they will be imperfect and of little value. The mind of man and his habits are controlled to some extent by the external and physical matters which surround him ; a disregard of this fact induces some to look only to the natural rights of man, regardless of the conventional forms in which these natural rights must be moulded, and by which they must be regulated and diminished. If man had attained, or could attain, a perfect knowledge of his duty, of his interest, of right and justice, accompanied with an uniform and unyielding disposition and willingness to do right and justice, his own will would be adequate for his government as an individual and as a member of society. Such is not the fact. He must, therefore, be subject to control, and that control must be equal to his inability or unwillingness to do right and justice. It has been said, that all men are born free and equal. This is the position from and in which all our institutions take their origin, and in the sense in which the words are used in our system they must be regarded as sound and as true. In the sense in which they are frequently used by politicians and partisans, they are not sound or true, either in the law of God, or of man. All men are alike entitled to be protected in person, in character, in property, and in the exercise and cultivation of their endowments. And so far as, by education and integrity, they make themselves competent to discharge the public trusts, they have equal right to participate in the exercise of such trusts.

Our theory proceeds one step beyond this, and asserts that men, educated and intelligent, not only have an equal right, but must be and in fact are competent to enjoy and to exercise, all the rights and duties which appertain to a state of society. It does not, however, assume that men can live isolated from each other and without society, or that they can live without law. In harmony with this view, our system provides and contains within itself ample means and opportunities for the cultivation and advancement of the people; and if they do not avail of the benefits it is their fault, and not the fault or neglect of government. Experience thus far has shown, that a large proportion of the people are willing to use the privileges conferred, and are in fact competent to fulfil the duties required of them. That all the people are or ever will be competent, cannot with propriety be said; but so long as a majority are, the public institutions and the system of government will be adequate to their purpose. The powers of the federal government to which I have referred are supreme; the several states may exercise similar powers for their own individual purposes; to this extent there has not been any diversity of opinion. I have, throughout, assumed that the powers of the federal government are both supreme and exclusive; that no state can rightfully exercise any of these powers for the purpose of executing or carrying into effect the duties of the federal government; that the powers which rightfully and constitutionally appertain to the several states are certain and permanent, and are not dependent upon the will of congress, or upon the performance or non-performance by congress of its duties. If the question be considered upon principle, and without reference to judicial dicta or decision, no sufficient reason can be suggested in favor of a contrary position. The theory which assumes, that the several states may exer-



cise the powers of the federal government for the purposes of the federal government, has never been asserted in direct terms, because the enunciation of such theory would disclose its fallacy. The language used by those from whose theory upon this subject I have ventured to dissent, is, that the several states may exercise some of the powers conferred upon the federal government in cases in which congress has not exercised them, and where no statute of the United States contravenes or conflicts with such exercise of power. This theory had its origin at the time of the adoption of the constitution, and was somewhat countenanced by the writers of the *Federalist*, who, anxious to procure an adoption of the instrument, exhibited and illustrated its powers in the most favorable aspect which could with feasibility be presented, so as to avoid an offence to state pride. When the constitution was submitted to the people for adoption and approval, state rights were as zealously maintained as they ever have been, and every effort was made by the friends of the proposed system to dispel the fears which were entertained, actual or feigned, that a consolidated central government was designed, or might, without design, be the result. A slight examination of the papers, designated the *Federalist*, will show the peculiar sensitiveness, at the time, of the public mind. These papers cannot, in all cases, although written by able, eminent, and patriotic citizens, be regarded as the most safe or authoritative source of construction. State right and state pride are certainly more endangered and lessened by having its legislation and its power dependent upon the action of another government, by having its legislative enactments set aside by the legislation of a superior government, than they can be by an adherence on the part of the state to its own admitted, indisputed, and indisputable power, although it may thereby be less



extensive, and confined within narrower limits. If this be the true theory, the statutes of one government, whenever rightfully and constitutionally passed, can never come in conflict or in collision with those of another. Whenever either government shall transcend its legitimate jurisdiction or sovereignty, it will be checked and restrained by the interposition of the judiciary; and the unity and harmony of our complex system, which was sought to be attained, will be so perfect as it can be. The position, that the several states may act because congress has not acted upon a particular subject, cannot be regarded as logical or judicious, if the national and state sovereignties are to be regarded as distinct and independent of each other, each having been intrusted with certain powers for different purposes, for the proper and faithful execution or exercise of which each, for its own acts or omissions, is responsible. It is not necessary or expedient, that all the powers of government should be in constant exercise; they are to be used as the exigencies of society, which are always changing, may require. Whenever congress shall omit to exercise any portion of the authority with which it is vested, the legal intendment and presumption to be made from such an omission is, that the authority ought not to be exercised. If congress, in relation to a subject over which it may rightfully legislate, should, by its enactment, say, that no legislation thereon is at a particular time or period fit or necessary to be had, such declaration would be regarded as conclusive upon the subject. I am unable to perceive any difference in principle between such legislative declaration, and an entire absence of legislation or declaration upon the subject. I have referred to the matter of exclusive power in the federal government, over and in relation to all matters confided to it, more frequently and distinctly than any inconvenience or difficulty which has

occurred may seem to require. As the territory over which the United States has authority has been increased since the adoption of the constitution, and may possibly be extended; as the number of the several states has been and may be enlarged; as the interests, occupations, and habits of the people of one portion of the country may become more and more diverse, distinct, and different from those of other portions, the urgency and necessity of a well-defined, distinct, and constitutional line or division of power between the national and state sovereignties, must and will be more and more apparent.

The national government is more exposed to danger than is the state, and in one of its departments is more exposed to corruption, and is more likely to encounter in its progress the effects of any sudden and temporary passion or excitement, in and to which the people may be and are liable to be drawn. Our security and safety from these dangers, from these causes, and the integrity of our system, must be obtained by a full and manly concession to each sovereignty of its rightful power and capacity; by a firm, constant, and prompt resistance to any exercise, by the one or by the other, of any and of every power not clearly deducible from our written charters or constitutions, construed upon the principles rightfully applicable thereto. If inconvenience and embarrassment may or must arise from the existence of two sovereignties, the legitimate inconvenience and embarrassment resulting from the system as it is, is to be preferred to any other, is to be endured until the system shall be amended. They cannot be avoided or cured by any temporary, contingent construction, which must be inadequate in itself, and liable to constant change.

The legislative department of the federal government is admonished and controlled by the constitution in several important particulars, designed to guard private right

from unnecessary restriction or interference by the government. "The migration or importation of such persons as *any of the states now existing* (at the adoption of the constitution) shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." This provision might be relied upon, if considered without reference to the history and condition of the country at the time it was written, as having a tendency, by implication, to show that the power of regulating the migration and importation of persons is vested in congress. The clause recited was not designed with such intent, but relates exclusively to the subject of slavery, to the importation of persons who might, by the laws of the several states, be regarded as property. It may be referred to as evidence of the construction which the framers of the constitution adopted in relation to other parts of the instrument.

The prohibition is in its terms temporary, extending only some few years in its operation after the adoption of the constitution, and has now ceased to have any positive operation. It furnishes a clear and conclusive implication, that slavery as it then existed, and as it was by the constitution *permitted to exist*, was regarded as exclusively local in its character and in its existence. The clause is confined to the states existing as such at the time of the adoption of the instrument, which were thirteen in number. Notwithstanding this prohibitory clause, if a new state, one which had not been established prior to the constitution, had been admitted into the union before the year eighteen hundred and eight, congress might have prohibited the migration or importation of slaves into such state. Whether the clause can be resorted to, for any purpose of elucidation, other than upon

the subject to which it refers, I do not consider. Another prohibition is found in the clause which says, "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

This provision exhibits the great attachment and even watchful solicitude of the American people, for their safety and security from and against the power of the government. This writ is, in fact, the most important element which any system can contain for individual indemnity from wrong and oppression. It is speedy and decisive in its operation, and is demandable as of right, although it may not be, and is not in practice, issued upon every application, when it is seen upon such application that the party applying is not entitled to the relief sought. This writ is, and has been, the constitutional shield of the English citizen from the encroachment of the crown, and its character and importance were brought by our ancestors as one of their inalienable privileges. The same principle which established the security of the writ of *habeas corpus*, induced a provision, that no bill of attainder or *ex post facto* law should be passed.

The other prohibitions are of a more general and public character and purpose. They provide that all capitation or other direct tax shall be levied in proportion to the population as ascertained in a census, for the taking of which, at short intervals, provision is made. They also provide, that "no tax or duty shall be laid on articles exported from any state; no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties to another." This provision insures the equality and relative importance of the states in their intercourse with each other, and leaves the energies of the



citizen free to be exerted for his own benefit, and uncontrolled, except within certain limits, by the government of which he forms a more immediate part, and which acts upon his neighbors, whose interests are closely interwoven with his own, at the same time, and with the same force and effect as it acts upon him.

The instrument which grants the legislative power, prohibits the withdrawal of money from the treasury, except under appropriations made by law. It provides, that no title of nobility shall be granted by the United States; that no person holding any office of profit or trust under the United States, shall, without the consent of congress, accept any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state. These powers, these restrictions, as has been said already, are designed to protect the several states and their citizens from foreign control or interference; to protect the states from each other; to protect the citizens, in some particulars, from state legislation; to secure to the citizens of other countries such immunities of trade and of intercourse as may be conceded to them by contract, by law, by the laws of nations, or by our courtesy. They are competent to the end contemplated; they exhibit the profound and far-seeing judgment, the love of humanity, the regard for private right, of those patriotic individuals who framed our constitution. In the construction of this instrument, they have erected to themselves an enduring, and, I trust, imperishable monument.



## LECTURE VI.

THE STATE GOVERNMENT.—THE PURPOSE AND CHARACTER OF ITS LEGISLATION.—  
WITHIN CERTAIN LIMITS IT IS SUPREME, AND EXCLUSIVE OF FEDERAL LEGISLA-  
TION OR CONTROL.

By the adoption of the federal constitution, the citizens of the several states, with the consent and approbation of the state sovereignties, became citizens of the United States, and conferred upon the federal sovereignty the powers which are defined and enumerated in its constitution. The people, as citizens of the United States, are one, and their relation to the federal jurisdiction is the same in every state. The several states, acting singly or together, in their political capacity, cannot resume the consent yielded to the people, and by them conferred upon the national government. The states, as sovereignties, cannot enlarge or diminish the power of the federal government, and cannot in any manner, except by suggesting the propriety of amendment, and by application to congress therefor, interfere with its constitution. The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to the constitution of the United States, or on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and pur-

poses as part of the constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode may be proposed by the congress. The relation of the people to their system of government constitutes an important and controlling element in any determination, which may be made upon several questions which have been discussed, and which may hereafter require an adjustment. Certain supposed state rights, the supposed right of a state to secede from the union, the supposed right of a citizen of one state to become the citizen of another state, carrying with him the property and rights of property which may be conceded to him by the law of the state of which he may have been a citizen, present for consideration questions of great import. The decision of these matters, whenever decision shall be required, must be had by an ascertainment of the position which the several states and their citizens occupy in relation to each other and to the federal government. This relation is susceptible of definition, and may easily be ascertained by reference to our system, as it is defined in its charters. It cannot be defined or ascertained, with safety or certainty, by a reference to any theory or system which any man or class of men may suppose the most beneficial to the people, or most in accordance with their speculations. The national government has certain jurisdiction, which it exercises upon the people of the United States, which they cannot subvert or change, except by an amendment of the constitution, or by revolution. This relation of the people to the federal government is direct, without any intervention or authority of the states as sovereignties. The state sovereignty has certain jurisdiction, which it exercises upon its citizens, and is not amenable to the federal government for its exercise. The people retain their natural

rights, so far as they have not surrendered them to the national or state control.

In the language of an amendment to the constitution of the United States, "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It is frequently said, that the laws of the United States are supreme, and that the legislation of a state, whenever it shall come in conflict therewith, must yield, upon the ground of superiority which one government has over the other. This mode of expression may be offensive to the sensibility of state pride, and on that account, and because it is not precisely accurate, is objectionable. The laws of the United States, constitutionally passed, are supreme, and no state law, if the state confines its action within its own jurisdiction, can or should come in conflict or opposition. If the congress enact a statute upon a subject not within its power or jurisdiction, it is unconstitutional and void; and any state legislation rightfully and constitutionally had upon such subject, must prevail, although inconsistent with a law of congress. The construction of the several state governments are substantially the same. Their departments are essentially the same, and they are similar to those of the federal government. The judiciary in some of the states is more dependent upon the will of the people than it is in other states, and is more so than is the judiciary of the United States. The right of suffrage, and the terms upon which it may be exercised, are not alike liberal and extensive in all the states, although it is broad enough to accomplish the purpose designed. Eligibility to office is more extended in some of the states than it is in others. In all, it is sufficiently extensive to answer the ambition of those who desire office. In many of the states, the legislature, frequently designated the general

court, has an annual session ; in other states the sessions are not so frequent. The several state constitutions contain provisions for their amendment, which are frequently exerted ; the legislation of all the states is changeable from year to year, or from session to session, so that the laws cannot be regarded as of a permanent and fixed character. This power of change is essential to the development of the resources and enterprise of the people, which are constantly changing, are constantly enlarged, and directed to new channels of improvement. It may be said, without doing violence to the truth, that this power of change is exercised more frequently than the public interest requires.\*

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\* The constitution of Massachusetts contains a provision prescribing the mode in and by which it may be amended ; thus, upon well settled and familiar principles of construction, excluding any and all other modes of amendment. Notwithstanding this provision, the general court, on the 7th of May, 1852, passed a statute, designated "an act relating to the calling a convention of delegates of the people, for the purpose of revising the constitution." This act evidently contemplates and provides for an amendment of the constitution of the present system of government, and not for the suppression and overthrow of the present form, and the erection of a new system, or of a new constitution, upon the ruins of the old. In pursuance of this statute, a convention is now (July 4, 1853) in session. It is a convention for one of two purposes, to wit, to amend or put down the present constitution. If it be for the purpose of amendment, it is unconstitutional and illegal ; and this view of the writer is sustained by the opinion of the justices of the supreme judicial court, which may be found in a supplement to the sixth volume of reports by Cushing. If the convention be for the purpose of establishing an entire new instrument and system, although it may propose to establish a similar instrument or system, it is revolutionary, disorganizing, illegal, and a reproach to the commonwealth. It stands upon no better foundation than stood the so-called Dorr Rebellion in Rhode Island, which the state resisted, and successfully. Those who consider the act as providing for an amendment, and to be sustained as such, regard the provision in the constitution which provides for its amendment, as only directory ; that the constitution is at all times in the hands and power of the people. No theory or doctrine can be more dangerous, unsound, or subversive of our free institutions. Provisions are regarded as directory, in relation to time, when time is evidently immaterial, and when, upon any other construction, the purpose of government or some fundamental principle of right must fail. When-



In many of the states the constitutions are preceded by a preamble, or bill of rights, which consist in an enunciation or declaration of certain fundamental principles, which appertain, and should appertain, to the people and to free institutions. These are not the same in every state, but they are in harmony with each other, and of the same general character. These bills of right exhibit the character of the people by which they have been

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ever the fundamental law or constitution of a sovereignty prescribes a mode for its amendment, no reason can be assigned, and no one can rightfully say, that a different mode and form is equally competent. When a charter provides that the corporators, as a body, or that some board, or component part of a corporation, may make by-laws, they must be made in the prescribed mode; they cannot legally or effectually be made in any other. In the case of Massachusetts, if its constitution is to be regarded, an amendment cannot be made by the people, without the concurrence of two thirds of the popular branch of the general court, and a majority of the senate, expressed for two consecutive years. The act referred to was passed by a majority of both branches of the general court, only at one session, for a single year. In no legal sense can it be said, that a provision which requires the consent of two thirds of a body may be regarded as immaterial and directory, and as a consequence that the consent of a majority is sufficient, much less can it be said, such provision has no force or meaning, and may be disregarded. It is due to the reader to say, that Mr. Rawle, a writer upon the constitution of the United States, a gentleman of great ability and purity, entertained different views. After the unsuccessful effort of Dorr, in Rhode Island, the legitimate government of the state made provision for the formation of a constitution, by delegates of the people, which was formed and adopted. The charter under which Rhode Island had previously acted, contained no provision similar to that contained in the constitution of Massachusetts, so that the cases are dissimilar. (See *Luther v. Borden*, 7 How. Rep. 1.) The administration of an oath may be regarded as a matter simply directory, et cetera, which are not applicable. Those who advocate and uphold the legality of the convention, whatever they may say, act upon an assumption, that a majority of the people, notwithstanding the constitution or any thing therein contained, may as individuals, or by their representatives, at any and at every moment, as matter of inalienable right, control the system of government which they have established. This may be agreeable to the people, but it is revolutionary and disorganizing. With equal propriety it may be said, that a majority of the people may, in all cases in which they are not restrained by the constitution of the United States, direct that this or that part of the constitution, or this or that statute, shall receive a particular construction.



adopted; the character of their charters and of their legislation; they do not operate to enlarge, diminish, or destroy the express provisions contained in the instruments to which they are prefixed. The preamble to the constitution of the commonwealth of Massachusetts says, "the body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may at all times find his security in them." This preamble is followed by a declaration of the rights of the inhabitants of the commonwealth, and constitutes a part of the constitution. These rights, except so far as they may be controlled by express terms, or by necessary intendment from other parts of the instrument, cannot be successfully invaded or denied by the legislative department. They exhibit an advanced state of civilization, and cannot be examined without admiration, without producing a conviction in the mind of every intelligent person, that man has capacity adequate to perceive and to pursue the purpose of his creation. All men, in the language of the instrument to which I have referred, have the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property. Religious freedom is secured to every citizen, his religious profession and sentiments are free from restraint, provided they are not made so as to disturb the public peace, or interfere with the profession or sentiments of others. No man, nor corporation, or association of men have any title to obtain advantage, or particular and exclusive privileges, distinct from those of

the community. Every individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws; is entitled to remedy, *by recourse to the laws*, for all wrongs or injuries which he may receive in his person, property, or character. No person shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally described, shall not be compelled to accuse or furnish evidence against himself, shall have a right to produce all evidence favorable to himself, and to meet the witnesses against him face to face. The trial by jury, which is the great bulwark of liberty, (except in some few cases,) shall be preserved. The liberty of the press is considered essential to the security of freedom in a state, and ought not, therefore, to be restricted. The laws, or the execution thereof, cannot be suspended, except under extraordinary and pressing cases of necessity. Provision is made for an impartial interpretation and administration of law, to the end that the rights of every individual, his life, liberty, property, and character may be preserved. The legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; so that the government shall be a government of laws, and not of men. These principles constitute substantially the foundation of every state government. The legislative department controls and regulates, so far as it may, without violation or subversion of the principles to which I have referred, rights of property, the mode of its acquisition, enjoyment, and disposition, the rights of persons, including life, liberty, character, and contracts; and generally has the supervision of the conduct, morals and manners and relations of the people

with each other, so far as such supervision is essential to the peace, quiet, and advancement of the community as a society. It should always be borne in mind, that freedom does not consist in the unlimited power of every person to act in accordance with his individual will or caprice. The liberty, the freedom which is vouchsafed by our institutions, is defined and regulated by law. This liberty can be sustained only by an unwavering adherence to law as it is, and shall be declared and expounded by those appointed to declare and expound it. The legislative department of this commonwealth is composed of two branches, the senate and house of representatives, upon whose action the governor has a qualified veto. After the exercise of the veto power has been had upon any bill, or resolve, the reasons of such veto are considered, and if two thirds of both branches of the legislative department adhere to the bill or resolve, it becomes and has the force and effect of a law, notwithstanding the executive dissent and disapproval. The legislative department of Massachusetts has full power and authority to erect and constitute courts of record, or other courts, to be held in the name of the commonwealth, for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, actions, matters, causes, and things whatsoever, arising or happening within the commonwealth, or between, or concerning persons inhabiting or residing or brought within the same, whether the same be civil or criminal, and whether the said pleas be real, personal, or mixed ; which tribunals are invested with all power and authority which may be required to execute and carry into effect the trusts reposed in them. And further, the said department has full power and authority from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either

with penalties or without; so as the same be not repugnant to the constitution, as it shall judge for the good and welfare of the commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof.

This department has authority to prescribe the tenure of office, except so far as the constitution has designated the same; to impose all reasonable taxes and duties. Notwithstanding the general terms used in relation to the legislative department, its power is restrained and limited, so far as its exercise is incompatible or inconsistent with the powers and duties of the federal government. Its power is also restrained and limited by the bill or declaration of rights, contained in the constitution of the state, in some particulars. Private property cannot be taken for the public use, except upon compensation to the citizen whose property may be taken. All taxes are to be established and levied upon the consent of the people, or their representatives in the legislature. The people have a right, in an orderly and peaceable manner, to consult upon the common good, give instructions to their representatives, and to request of the legislative body by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer. Laws made to punish for actions done before the existence of such laws, are regarded as unjust, oppressive, and inconsistent with the fundamental principles of a free government. The constitution of Massachusetts has made ample provision for the education of the people, and for the advancement of learning, by recognizing the university at Cambridge, and by providing for other institutions. The language of the constitution upon this subject, is full and explicit. It says, "wisdom and knowledge, as well as virtue, diffused generally among the body



of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them, especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections and generous sentiments among the people."

Several times it has been stated, all our institutions, political and social, are founded upon an assumption that an intelligent and well educated people are competent to establish certain organic or fundamental charters or constitutions of government, and, through the instrumentality of these charters or constitutions, are competent to govern themselves. The constitution to which reference has been made, in the clause recited, has made ample provision to enable the people to attain the status or condition required; has furnished them an opportunity of obtaining the education and intelligence which our theory of government demands. In this respect, they are not left to their individual exertions; but the public authority, at the expense of the commonwealth, has provided for the reasonable education of all the inhabitants, without reference to any supposed rank or fortunate condition, which may result from any casual or other circumstance,



beyond the control of government. The children of the poor and of the rich, are alike provided with the means of instruction. The children of aliens and aliens born, are allowed the benefit of the public schools. The legislature of Massachusetts has even provided by law for the attendance by compulsion, if need be, of those who are unwilling to enjoy, or are unmindful of, the benefits extended. The legislative department of the commonwealth to which reference has been made, is, in the general powers conferred, similar to the legislative department of the several states which compose the union. Some of the states have not, in their constitutions, adopted terms or provisions so full and explicit upon the subject of schools and education. In some of the states, instruction is not provided at the public cost. These states, however, are not without the means of instruction, and evidence is constantly furnished of efforts made in the several states to establish public schools; and it cannot be doubted, that they will be maintained ultimately throughout the country. Efforts and associations have been made and entered into in the New England states, and probably in others, to send teachers to the states in the west, so that those who commence to cultivate and bring forward new states may be countenanced and encouraged by those whose pecuniary ability may be greater. This disposition to aid and encourage each other is not local, or confined to any one state, or to any number of states, but may be and is discovered in various ways in every state of the union. In truth, the prosperity and advancement of every state is a matter of pride and gratification to every other state.

The people of the several states are not only progressive in enterprise, in mind, and in manners, but they are somewhat migratory. Every new state numbers among its inhabitants many active, enterprising citizens, young

and old, from some one of the original thirteen states. These persons carry with them their education, and it becomes capital for others so well as for themselves. The provisions contained in our system for the education of the people cannot be appreciated beyond their merit, or be guarded with too much care. The most absolute and despotic government of the world, by the cultivation and education of its people, would, in a few years, find its power diminished; such diminution would continue until the rights of the people should be regarded and recognized and exhibited in the establishment of mild and salutary institutions of government and of society, inasmuch as the power of a well disciplined intellect is more certain and extensive in its exertions and influence, than mere physical force can be. The legislative department of the state sovereignty extends to all matters of a local character, to all the subjects which appertain to the business of life, and concern the general welfare of the body politic. The power so conferred has been executed in conformity with the enlightened principles which gave it existence, as may readily be seen by an examination of the statutes of any one of the several states. The ownership of land, the title to the soil, has always been regarded as conferring upon its possessor an influence and importance which is not derived from other property. In many countries its acquisition is difficult, and few only are enabled to obtain a fee-simple or perfect title thereto. In England, the proprietors of the soil constitute a small proportion of population, compared with the number of its inhabitants. Many restrictions are imposed and exist, which do not exist in this country. The policy of Great Britain, in relation to the ownership of its soil, has been the subject of complaint from many of her citizens; it has also furnished an occasion for much comment by the press and by individuals of this country.

If these restrictions were removed, the effect would be troublesome and dangerous to the government. It cannot, therefore, be regarded as strange and unaccountable, that they should be adhered to with firmness, as they have been and are, to a great extent, by those immediately connected with the government and its administration. These restrictions are not so numerous or burdensome at the present time as they formerly were. The popular voice and the popular will, as it increases in intelligence, must be heard in and under every form of government. The great facility which is afforded to every American citizen to become an owner of land, of the homestead upon and in which he lives, and which is cultivated and improved by his labor and by the labor of his children, is an important barrier against the oppression of government and of those in authority. It is also favorable to the stability and existence of the government. It gives to the occupant self-respect, and he goes forth to make the wilderness blossom like the rose, because the fruit and product of his labor is his own. The condition and extent of civilization, of liberty enjoyed by any people, may be ascertained with an almost unerring certainty by learning its law applicable to the occupation and disposition of its soil. An eminent jurist has said, there is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. He might with truth have added, that this sentiment, or love of dominion over property, is more applicable to the soil, to immovable property, than to any other class. The legislation of different countries, in relation to land and its title, is an interesting study, and may be examined with profit by those who are disposed

to learn the progress of social institutions ; the result of such examination will satisfy those who make it, that the freedom of the people is dependent, to a great extent, upon their ability or inability to become freeholders ; the succession to landed estates in Europe has been generally regulated by the custom of primogeniture. During the violence and confusion of the middle ages, land was the only species of property which had any thing like reasonable security ; and, deficient as it was, that security could be enjoyed only by the possessors of large estates, who could arm and bring together a considerable number of vassals and retainers to support and defend their rights. It was plainly, therefore, for the interest of the landed proprietors to prevent their estates from being divided into small portions, so that they might be transmitted entire to their successors. It was customary in England, from an early period of its history, to settle estates upon individuals under certain conditions and stipulations. Modes, however, were adopted by lawyers and by judges of eluding and evading these conditions. To prevent and obviate such evasions, a statute was passed in the time of Edward II., by which it was provided that estates should be holden in conformity to and in subjection to the terms and conditions of the donor. This statute established a system of perpetual entail, which was established by the greater barons to prevent not only the alienation, but the forfeiture of their estates for political offences. This statute produced many inconveniences and evils : children grew disobedient when they knew they could not be set aside ; farmers were deprived of their leases made by tenants in tail ; creditors were defrauded of the sums or debts due to them ; treasons were encouraged, as estates tail were not liable to forfeiture longer than for the tenant's life. The statute of Edward was regarded, for these reasons, as the source



and cause of contentions and mischiefs unknown to the common law before its passage.

The security which this statute afforded to the nobility operated against its repeal for many years. Its effect, however, was avoided to some extent by indirect means, by what was familiarly designated a pious fraud of the lawyers. This fraud consisted in the invention of a fictitious suit, known as a common recovery, by the instrumentality of which a tenant in tail was enabled, by the aid of the courts, to bar the entail and change the estate into a fee-simple. This mode of proceeding was in common use in many of the states, until within a few years; and many titles now rest upon the efficacy of this invention, or fraud of the lawyers.

Estates in tail are common in Scotland, although under restrictions peculiar to that country, not known to the English law, which restrictions had an influence to render them less objectionable than they otherwise would have been. In this commonwealth, and generally in the several states of the union, conveyances of lands, or of any interest or estate therein, may be made by deed executed by any person having authority to convey the same, or by his attorney, and acknowledged and recorded, without any other act or ceremony. A husband and wife may by their joint deed convey the real estate of the wife. The husband cannot, however, by any conveyance to which the wife is not a party, deprive her of her right of dower in his estate, which right in almost every state extends to all land susceptible of cultivation, of which the husband, during the continuance of the marriage, may have seisin and title, although such seisin may have been, or be, of short duration. In one state, at least, this right of dower does not attach, or extend to any estate of the husband, except such as he may be entitled to at the time of his decease, thus enabling the husband, by a sale in



his lifetime, to bar this equitable and valuable right. Any person actually seized of land as tenant in tail may convey the same in fee-simple, by a deed in common form, in like manner as if he were seized thereof in fee-simple, and such conveyance shall bar the estate tail and all remainders and reversions expectant thereon. Any person seized of real estate, including, in some of the states, married women, under certain limitations designed for their protection, may dispose of the same by will. Lands are also subject to the payment of the debts of those who may be the holders and owners thereof. It has been holden in a neighboring state, that a person who has a life estate in land, with an unlimited power of disposition to take effect at his decease, who exercises the power so conferred, and attempts to dispose of it as though it were his own, thereby subjects it to the payment of his debts in preference to the objects of his bounty. In this country, land cannot be kept in the same family or line of descent, for any great length of time, so as to be beyond the power of alienation. These few general incidents of land and its ownership have produced an entire change in and from the condition and state of land which existed at the settlement of this country, and which to some extent exists in England at the present time. At the adoption of our union, in almost every state the owner of land was allowed to entail it, to keep it in his family for generations, and thereby restrain the enterprise of those who were its possessors, and embarrass and retard the general advancement of the community. No legislation or legal principle has done more, or even so much for the political and social improvement of the people, as has been done by those provisions which authorize the tenant or holder of an estate tail to dispose of the same by a simple deed, and which subject such estate to the payment of the debts of

the holder, and which restrain the creation of estates in a class or line of persons to the exclusion of others, over which estate the holder for the time being has no power of alienation, or permanent disposition. The accumulation of estates in families is injurious often to the possessors ; is disadvantageous to the public welfare, inconsistent and incompatible with free and progressive social institutions. The difference of opinion upon this subject, as exhibited in American legislation and in the writings and opinions of those not conversant with our system, is remarkable. Some half century since, an intelligent and practical farmer in Scotland was requested to give his opinion, whether it would be advantageous to the agricultural interest of his country, were the tenants, especially those in the best cultivated districts, vested with the power of sub-letting their farms ; and, supposing the tenants had such power, and the power of dividing their farms, and of devising them by will, what would be the probable influence of such power on the agriculture of the country and the condition of the tenants.

At the time these questions were proposed, it was the custom of landholders and owners to make leases of large quantities of land, for periods of nineteen and of twenty-one years, the tenant having no power of leasing or devising his estate. The answer, honestly given, no doubt, was adverse to the theory which dictated the questions. He says, "the practice of letting land on leases of nineteen years, having been general for nearly a century, and the power of sub-letting having been very rarely conceded, the lands have naturally fallen into the occupancy of that class of persons, who engage in the business of agriculture with the full purpose of devoting their lives to it. Much of the superiority of Scotch agriculture is ascribed to the steady, enterprising character of the cultivators. And the system of letting land upon leases for

a definite number of years, with the prohibition of assigning or sub-letting, has contributed largely to the formation of that character and enterprise. A man entering upon a lease for nineteen or twenty-one years, with the knowledge that it is not in his power to transfer it to another, and that his interest in the farm will terminate at the expiration of the stipulated period, is stimulated to a vigorous and early execution of the necessary improvements, as he knows that the longer they are delayed, the more will the profits derivable from them be diminished. To produce this effect, it is indispensable that the lessee or his heir at law should possess the farm during the continuance of the lease, and consequently that there should be no power to assign or sub-let. This individual supposed that the change suggested by the inquiries, would operate unfavorably upon the interests and upon the habits and character of the people. He spoke from his experience and observation. He was a stranger to the activity, enterprise, and self-respect of a people, free and unrestrained, except so far as restraint, from the organization of society, is essential to uphold it. He admitted the existence of a strong desire in a majority of those, a single remove or two above the condition of laborers, to possess a piece of land; that such desire had been unequivocally established by the experience of every country, where facilities for its gratification had been afforded. He admitted that this desire was exceedingly powerful; that every one wished to be independent; that those who had attained the possession of a few acres of land, and of a house, had attained, in their own estimation, independence, or at least had made a great advance on the road to independence. The opinions and experience of the individual to which reference has been made, are not in unison or in harmony with the experience of this country, or with our institu-

tions. They furnish a striking contrast between our system of legislation and of government, and that of the country, comparatively free as it is, in which such opinions were the legitimate result of its internal institutions. The baneful influences of long leases have been made manifest from the turmoils and outrages which they have produced in a neighbouring state, and have been felt in some of the New England states, from glebe lands, which are not altogether extinct. In relation to the capacity of persons to make wills, changes have constantly been in progress. The power of devise was originally extended only to a portion of the estate of the devisor, or to estates derived by the devisor in a particular mode. In this country, few restrictions exist; the formalities required are not numerous, or difficult of attainment. The law applicable to the possession, the acquisition, and disposition of land, to the making of wills and testamentary papers, has been constantly progressive in its liberality and simplicity; and the result is, that an adequate knowledge of these subjects may be acquired in a few years, which formerly could not be attained except by the devotion of a life to its acquisition and attainment. These subjects are exclusively within the province of state legislation and of state sovereignty; the federal jurisdiction does not extend to them, but each state, according to its habits, its position, and its pursuits, adopts regulations agreeable to its own sense of right. These regulations, although not the same precisely in the different states, are substantially the same, except in one or two of the states, in which the civil law, or the law of France, or of Spain, which are influenced and somewhat derived from the civil law, prevails so far as it may not be inconsistent with our political theory, or with the republican institutions which flow from our theory.

Personal property is also subject to state sovereignty;



its incidents are regulated by state law. Personal estate, in technical or legal language, has no locality. Its title is ascertained by the law of the country or state in which its owner has his domicile. A conveyance of personal estate, legal by the law of the place of which the owner is a citizen, is ordinarily regarded in every other country as a legal transfer; this is so as a matter of comity and as a general legal principle, between countries not connected with each other, as part of the same political system. It is peculiarly so, between the several states of this country. The mode or form of transfer of personal estate from one person to another, is not ordinarily regulated by arbitrary or fixed rules. It may be by delivery, with intent to pass the title. It may be by a bargain and sale, without delivery, or by exchange or barter, a method of disposition quite common in new countries, or in the early stages of society. In some instances, the title passes between the parties negotiating, when it does not pass against other persons who may have the power to acquire an interest. A creditor of the owner of personal estate, may obtain a right therein, against a party who as purchaser may have a vested title to it against the former owner. Some personal estate, such as shares in the capital stock of banking, manufacturing, and other corporations, must be transferred upon the books of the corporation in order to confer a legal title, although the beneficial or equitable title may be transferred without such entry upon the books of the corporation. The ownership of vessels is ordinarily transferred by written bill of sale, and must be so transferred, to confer upon the vessel the character of an American vessel, and the protection and immunities of a national character. The title between parties may be transferred, in this country, in a vessel without writing. The most important statute regulation, in relation to the transfer of property, is denom-



inated the statute of frauds. This statute provides, "no contract for the sale of goods, wares, or merchandise, for the price of fifty dollars or more, shall be good or valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment; or unless some note or memorandum in writing, of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." We received the principles of this statute from England, and it is evidence of an advanced state of society. The policy of the provision is wholesome, inasmuch as the memory of witnesses is not always a safe guide.

The object of the law-maker is to prevent fraud, to prevent litigation. It proceeds upon a very well established fact, applicable to all the conditions of life, that evil can be prevented much easier than it can be cured, or its effects avoided after its occurrence. The character of a people is exhibited in its legislation upon property. If the statutes upon this subject are few and simple and easily understood, it may be and should be inferred that the general integrity of the people is undoubted. Numerous and complex statutes result from a disposition in the people to avoid and resist a performance of their duties. Examined by this standard, the legislation of the several American states must receive the commendation of those who analyze it, by those who study cause and effect.

Contracts constitute another important matter of state legislation. The persons who may enter into contracts, the form and subject-matter of contracts, are all regulated by state authority. Upon this subject, great freedom is allowed. The citizens in this particular, with some few exceptions, determine, unrestrained by legal enactments, when and in what undertakings they will embark. Some

contracts cannot be upheld, unless in writing. An individual who, without consideration, and as an act of friendship, makes a verbal promise to pay the debt, or perform the obligation of his friend or neighbor, is not legally bound to perform his promise. A moralist, who looks at the mere matter of right and wrong in an abstract view, or who may regard only some individual case, may consider this as unwise, or as evidence of a defect in the science, or in the administration, of law. The provision which requires such promise to be in writing to render it legally effectual and availing, has a substantial foundation in the wisdom and experience of ages, and cannot be regarded as a reproach to the science of jurisprudence. Individuals may use terms broader than they intend, when speaking of their willingness to aid another having no inducement or purpose of their own, other than friendship, to accomplish. The terms used may be understood by those to whom they may be addressed, or by those who may hear them, in a sense broader than was intended or designed by the party using them. Many circumstances, derived from the experience of business men, might be adduced to show that the safety of individuals and of the community as a whole, is promoted by requiring such contracts to be evidenced by a written memorandum; in this way fraud and mistake are prevented. Other contracts of a similar character, and from similar principles, are required to be in writing; but a large proportion of all contracts may be established by any satisfactory proof which the parties can adduce, resorting in all cases to the best or most natural proof of which the subject may be susceptible. Contracts in relation to land, as a general proposition, must be in writing. A party who is competent to make a contract by his own will, or at pleasure, may make it through the instrumentality of his agent, servant, or attorney. Contracts should

have a consideration, either good or valuable, as a mere gratuity or voluntary undertaking is not ordinarily the subject of legal enforcement; the consideration must be legal, otherwise it is unavailing as the foundation of a contract. Contracts, legal by the law of the country in which made, are regarded as legal and obligatory in every other country. To this rule there are exceptions. Contracts perfectly legal in the state or country in which made, will not be enforced in another state, where such enforcement must or may be inconsistent or incompatible with the institutions of the country in which they are sought to be set up. This arises from the necessity of self-preservation and self-respect which is imposed upon every community. Some contracts are regulated by law for the purpose of protecting parties thereto from their own weakness, or from the pressure of their condition; laws upon the subject of usury are of this description. Money is the standard by which, in a commercial or advanced state of society, all other articles are measured and their value determined. The business of society cannot well be conducted without its possession and use; consequently men may be induced, through many controlling influences, to pay or stipulate to pay for the loan of money more than they can afford to pay, with profit to themselves. To guard against such improvident conduct, the law-maker intervenes and avoids the contract, or imposes penalties upon those who stipulate to receive more than the legal use or rate prescribed by law. Many writers and many individuals have regarded the policy of such legislation as unsound, and as an unnecessary interference with private contracts; that money is merely an article of trade, and is worth precisely so much as can be obtained in promise, or other property therefor. If the propriety of usury laws is to be determined by the course of legislation which has been had upon the subject

in various countries, they must be regarded as wholesome and beneficial in their influence. These statutes in the several states are not the same; in some it has been the policy of the law to avoid entirely the force and effect of a contract which is usurious; in others, to impose a penalty in the way of deduction from the sum loaned. The last course has, within a few years past, become the most usual method adopted. All these matters are the subject of state sovereignty, with which the federal government has no concern.

The regulation of internal trade is a matter of public concernment, and is regulated by state authority. This power is not and cannot rightfully be exercised so as to prohibit the citizen from engaging in any wholesome business or occupation which may be congenial to his inclination, or conducive, in his own judgment, to his individual advancement and welfare. The public interfere only for the protection of the public, and only so far as the safety and interests of the body politic may require. Auctioneers and brokers are required to conform to certain rules, and to have a license; pawnbrokers and many other occupations are obliged to submit to certain restrictions, designed to maintain their integrity and the rights of the community. The care and disposition of many kinds of property, which are dangerous in themselves or susceptible of evil, is intrusted to the legislative department of every government, and when exercised within constitutional and judicious limits, such care and disposition are productive of individual and of public good. This power intrenches itself closely upon individual right, and must produce evil and disquiet in a community when improperly extended. In relation to legislation of this description, the American people are sensitive, and do not submit without impatience, except in those cases where public opinion is very decisive and



somewhat uniform upon its fitness. In a free country, law must coincide with and follow the habits of the people, or it will produce an uneasy and restless state of mind, from which no good can come. Law, in a free country, judiciously established, can and will quietly mould, chasten, and regulate the habits of the people. It cannot create virtue or intelligence.

The preservation of the public health is intrusted to the several states. Boards of health are established by law in the several towns, which are authorized to adopt, within prescribed limits, rules and regulations for the preservation of health. These boards exercise an important influence upon the moral and physical condition of the people. The proceedings and measures of these boards are of a quiet, unobtrusive character; [are of constant and daily operation, insomuch that the result produced is apparently derived from the habits and inclination of the people, and not from the force of legal enactments. A stranger to our institutions, taking only a general survey of the people as they may be seen in their ordinary pursuits, each following his own inclination in the selection of his occupation, would incline to suppose that the community is governed by its own will, without coercion or restraint imposed by law. This, to a great extent, is undoubtedly true, and must be so in a government established and substantially controlled by the popular will. Inspection laws are of the same character, and are matters of state legislation. Many of the articles which are of ordinary and daily consumption, before offered for sale, must be examined by a public officer, and their character and quality designated. In this respect, the public are protected against their incapacity, their carelessness or want of attention, and against fraud and imposition, which otherwise might be practised against them. Quarantine laws are established, which



apply to the citizens of the state in which they are enacted, and also to the people and to vessels belonging to other states and to foreign nations, which may come within the limits or jurisdiction of state authority. Highways and bridges are established by towns and by counties, for public convenience and at public charge; they are also established by and under authority granted by the state, by individuals, and by corporations, in which cases the proprietors are bound to keep them open and in repair, accessible to the people. As a compensation, the proprietors are authorized to assess or charge upon those who use them a toll or tax, which is regulated by public authority. Another important and extensive power, exercised under and by state sovereignty, is that of its internal police, which embraces the settlement and support of paupers, the regulation of licensed houses, the care of lunatics, the observance of the Lord's day, the prosecution and punishment of immorality, the law of the road, the preservation of useful animals.

The effect of this power is constant. It operates upon the most important interests of society, and its several relations. The provision made for the support of paupers, in many of the states of the union, is extensive, and has been and is the cause of large expenditures of the public money. The humanity of the people in this particular, is exhibited in a favorable aspect. The benefits of the system have been extended to all persons who may require assistance, without reference to their origin or citizenship; and they have, no doubt, in many instances, fallen upon those not entitled. The propriety of our system, in relation to paupers, has been the subject of discussion by writers upon political economy, without producing any certain and reliable judgment as to its fitness, compared with other modes of relief. It is, in fact, one

of the most embarrassing and difficult subjects which can engage the attention of the law-maker, or the thoughts of the humane and benevolent. If any error has been made by the American people, it has been on the side of liberality. That some provision must be made upon this subject by the public, cannot with propriety be denied. It is due to the public safety and preservation, to the peace and quiet of the community no less than to those sentiments of kindness and sympathy which should ever be extended to those whose misfortunes are above and beyond their control. The powers to which reference has been made, health, inspection, and police regulations, have always been conceded to state authority, even by those disposed to yield to the federal government the most enlarged power which it can exercise under its constitution. The language of the supreme court of the United States has been clear, uniform, and decisive. A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered or restrained by the constitution of the United States. It is not only the right, but the bounden duty of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, in all cases where the power over the particular subject or the manner of its exercise are not surrendered or restrained by the constitution of the United States. All those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive. In some instances it may be, and undoubtedly is, difficult to define with certainty and perfect

accuracy the point at which one jurisdiction commences and the other ends. This can, however, be done with sufficient precision and accuracy to prevent collision, so long as the different sovereignties manifest a spirit of moderation, and a determination not to exercise or enlarge any supposed doubtful power.

The supreme court of the United States, on one occasion, in speaking of the police power of a state, said: If the court were to attempt a definition of it, they would say that every law came within the description of a regulation of police which concerned the welfare of the whole people of a state, or any individual within it, whether it related to their rights or their duties; whether it respected them as men or as citizens of the state, in their public or private relations; whether it related to the rights of persons, or of property of the whole people of a state, or of any individual within it, and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction. This definition is undoubtedly sufficient as a practical guide, in the determination of any question which may arise. Definitions, however, in general terms are unsafe, and liable to mislead, whenever their application to an individual case, or particular state of facts, is attempted. So far as I have been able to analyze the question, it seems that the state sovereignty extends to all things, to all persons, all contracts within its territorial limits which do not appertain to the foreign relations of the United States, or to the relation which subsists between the several states as independent sovereignties, or to the private rights which the constitution of the United States concedes to the citizens of a state, to be enjoyed by them in another, in the exercise of which sovereignty the obligation of a contract shall not be invaded or impaired.

## LECTURE VII.

THE STATE GOVERNMENT.—THE PURPOSE AND CHARACTER OF ITS LEGISLATION.—  
WITHIN CERTAIN LIMITS IT IS SUPREME, AND EXCLUSIVE OF FEDERAL CONTROL  
—RESTRICTIONS IMPOSED THEREUPON.

SEVERAL of the subjects embraced within state sovereignty, which are controlled by its legislation, have been discussed. Some of the most important remain to be examined in general terms, sufficiently definite, however, to exhibit their character, purpose, and practical operation. The authority or power to establish corporations, for municipal and for business purposes, appertains to the state sovereignty, so far as it may be exercised for internal matters, and it has been exercised in the several states with great liberality, and with more frequency than the public interests have required. In many of the states, the sovereign power is exercised by the creation of municipal corporations, through the instrumentality of which some of the purposes of government are executed; counties, towns, and cities, belong to this class of corporations, and exercise such authority as the legislative department of the state, from time to time, may confer. The purpose to be accomplished by them is of a public nature, and their doings are upheld and sustained, whenever they may be without violating some fundamental principle, or provision of the constitution or some statute applicable

to them. Every intendment in favor of these corporations and of the acts of their corporate officers is made, which with propriety can be, upon the broad principle, applicable to our system and to every portion of it, that the government and the trust confided thereto, must be sustained. These corporations are subject to the control of the judiciary, and they may be restrained, and their officers may be enjoined from going beyond their power or rightful jurisdiction. They may also be required to perform the trusts and duties with which they are or may be intrusted.

The officers of counties, towns, and cities, are generally elected by the people, and their appropriate duties, in general terms, are prescribed by law, so that their discretion is somewhat controlled. This subdivision of authority is convenient, and well adapted to the speedy and careful management and protection of the public interests. In a political view, and as a branch of our political economy, it is of the utmost importance. The division of power, the establishment of institutions, by and through which all the purposes of government are accomplished, constitutes a prominent feature in the several state governments, and may be regarded as one of the safeguards of the people, and of their rights. The public business which concerns and appertains to the daily pursuits of the community, is performed by these municipal corporations, so that the administration of the powers of government in these matters, is conducted and exercised by those whose immediate interests are operated upon. Every citizen, by his right of suffrage, by his personal opinion and influence, and by his eligibility to office, holds his personal security, to a great extent, in his own hands; and if this is invaded, such invasion must result from his neglect of and inattention to his duty. As a general fact or position, it may be said, these corpora-



tions confine their action within their corporate limits or power, although instances have occurred, in which they have transcended their appropriate sphere. Towns or municipalities under a city organization are more likely to exceed their jurisdiction, than are those which act under a different system. City officers, from habit, from association, and from the nature of their powers, are regarded as of more importance and dignity than are plain common citizens, acting under the name of selectmen. The power of a city government, is undoubtedly more direct and efficient than is that of a town, which has no such organization. The chief executive officer of a city devotes a large proportion of every day to the duties of his station, and is more directly the object of observation and responsibility than is a selectman of a town. Many other officers devote a large proportion of their time to the public duties. The population of cities is usually greater than is that of a town. In the commonwealth of Massachusetts, it was formerly doubted whether the legislative department had power to establish city governments. To obviate this supposed difficulty, the constitution was amended, and the general court is now authorized to establish city governments in any town which has at least twelve thousand inhabitants, provided the application for a charter, and its acceptance, shall be made by a majority of the inhabitants voting upon the question. The powers, privileges, and immunities granted, if not repugnant to the constitution, are such as the legislative department of the state may consider expedient, provided that all by-laws made by any city government shall be subject, at all times, to be annulled by the general court. This division of authority, as an element of political economy, is not without influence in another important aspect. It creates a large number of offices, all of which, although they are not equally fasci-

nating or desirable, or of equal pecuniary value, are readily and easily filled. The love of place, of power, is natural to the human mind; it is as great under a republican form of government as it is in any other. Arbitrary power, or its unauthorized assumption, is more easily resisted and controlled in a republican form of government, than it can be in a government whose source of power is not immediately derived from the people. So far as power can be safely divided, its authority diffused, and its execution intrusted to a large number of individuals, it should be, inasmuch as thereby the entire people apparently constitute the government, as they do in fact, except so far as they have limited and controlled their right and capacity by constitutions, by charters, or by statutes. By this diffusion of authority, the distance and difference which otherwise might seem to exist between those, who from time to time control the machinery of government, and those governed, is trifling and unimportant. The capacity of towns, of cities, of counties, or other territorial divisions, as parts of a state sovereignty or government, to perform their duties, is understood and admitted at once, upon its suggestion or statement. No cause of conflict between them and the state sovereignty can arise, because all these divisions have limited, subordinate, and prescribed trusts, and are subject, in their exercise and performance, to the direction of the state, carried into effect by its legislative, judicial, and executive departments. The corporations to which I have referred are of a public nature, and exclusively for public purposes. They have no power to embark in enterprises or business operations of a private character, however profitable or plausible they may seem to be, which are not essential to the existence or exercise of the legitimate purposes of government. Under state sovereignty, a large number of other corporations of a private nature,

for the profit and advantage of individuals, have been and may be established. They are designed to facilitate, to aid individual enterprise, and thereby subserve the general welfare and interests of society. The progress of society, of its institutions, the employment of capital, of labor, are advanced and carried forward by these corporations. The wealth and importance of the community, as a whole, is undoubtedly enlarged by their operation. They are, however, dangerous implements, inasmuch as individual responsibility is frequently merged and lost in that of an intangible corporate existence.

In the early legislation of free states, especially of those which are new and unimproved, acts of incorporation are easily obtained. Efforts for individual gain are always importunate, and, when accompanied by glowing exhibitions of public advancement, generally succeed in obtaining the desired implements, by which it is sought to be attained. This is evident from the legislation of the several states, in relation to corporations created for private purposes. Restrictions, from time to time, are imposed upon their action. Their charters may be taken away by the judiciary, and may be declared void upon a hearing, and satisfactory proof of any clear and material violation of their chartered rights or duties. In many instances, by express provision in the charters granted, the legislative department reserves to itself a right of repeal or rescission of the grant. In many of the states, it has recently become common to provide by general statutes, that corporations thereafter established, shall be subject to revision, alteration, amendment, or repeal, at the pleasure of the department which created them. They are also made subject to examination by public agents or officers; are obliged to report to the public authority their condition and doings, and, under certain circumstances, the stockholders or corporators are made person-

ally responsible for the obligations and acts of the corporations of which they are members. As these associations increase in number, as the facility of obtaining chartered rights is enlarged, the care of the law-maker, to prevent wrong and injury to the community, is increased. Notwithstanding all the restrictions which have been, or can be, imposed, it cannot be doubted or denied, that corporations are altogether too numerous. Many of the most common and ordinary business operations are carried on by the instrumentality of a charter or act of incorporation. The argument put forth generally in favor of an extension of the number of incorporations is, that they constitute monopolies; that their extension has a tendency to prevent the inconveniences ordinarily resulting from a monopoly, inasmuch as twenty or fifty monopolies will embrace more individuals than can be included in a less number. It is also urged, that any person, or number of persons, has and have the same right to obtain the privileges and immunities of a charter as any other person or number of persons may have. This course of reasoning is specious, and has much of truth and soundness in its composition, but does not contain all the elements or principles applicable to the subject. Although corporations are for the personal benefit and emolument of the corporators, individual benefit is not the sole motive or cause of their creation. The theory of the government is, that thereby the public interest and welfare may be extended and promoted in a manner in which it could not otherwise be. Corporations ought not, therefore, to be established, except some public good may probably be accomplished, which would fail in its accomplishment, if left to individual exertion. The power of establishing corporations has given rise to a very important and interesting discussion, in relation to the right of government to divest itself of its sovereignty.



The government may grant any property of which it may hold the title, and having made the grant, cannot resume it of its own sovereign will, except under its power to take private property for the public use, by making compensation therefor. It may grant a franchise such as the right to take toll upon a bridge, ferry, or pike road, and by payment therefor may resume it for the public exigency. Other grants or privileges conferred by the legislative department may be resumed; in other words, the sovereign power cannot be exercised to its own destruction or to the diminution of its sovereignty, so as thereby to destroy or impede the execution of those public trusts for which government is established. Offices may be established for public purposes, to continue for a definite period of time; notwithstanding which limitation, they may be abolished before the lapse or expiration of such period, without legal cause of complaint, and without compensation for any supposed individual wrong or inconvenience which may occur. In all cases of grants by which the right of eminent domain, the power of sovereignty is diminished or surrendered, it must be clearly and distinctly shown, as no such diminution or surrender of sovereignty will be assumed or sustained by implication. The corporations of a private character to which I have referred, are familiar to you; the most prominent and useful are banks, insurance companies, manufacturing companies, railway charters, aqueduct, library, and agricultural associations. All these exercise an important bearing upon the relations and occupations of the community; they are of state creation, and subject exclusively to its management and control, without the intervention or interference of the federal government.

The principal rights, duties, and remedies, which appertain to, or result from, the relation which subsists between debtor and creditor, are matters of state sovereignty, and



are regulated by its jurisdiction. The legislation of the several states upon this subject has generally been so designed as to uphold private right; to encourage the security and integrity of individual credit. The early history of the New England states, as illustrated by its legislation upon this subject, evinces a more decisive and determined effort on the part of the law-making power to secure and enforce the payment of debts and the performance of obligations, than is exhibited at the present time. In every state the property of a debtor is liable to be seized by legal process, and ultimately applied to the payment of his indebtedment. This liability is not equally extensive in the several states. The exceptions and exemptions of property are more extensive in some, than in other of the states. Certain articles of household goods, wearing apparel, school books, implements of trade, equipments for military duty, and other articles to be selected by the debtor, not exceeding a fixed sum in value, ordinarily varying from twenty to fifty dollars, as appraised by a public officer, (the sheriff or his deputy,) whose liberality, with rare exception, is equal to that of the law under which he acts, are exempted in the several states, and excluded from the reach of the creditor. The legislation upon this subject develops certain principles; a desire to preserve private faith, to secure the performance of private obligation for the benefit of the creditor, and at the same time to enable the debtor to preserve the means of education and instruction for himself and family, and to retain the implements which are essential to the performance of those duties which the public require, and more than and beyond this, his fireside cannot be divested of articles, although they may be few and coarse, which are of daily use to the family household. In some of the states property cannot be arrested by a creditor, until after his title or right as a creditor shall

have been judicially ascertained. In other of the states any person who supposes himself to be a creditor of another may, upon his own motion, cause the property of his assumed or supposed debtor to be seized and retained until the question of right shall be determined. A debtor, in many of the states, may be personally arrested by a creditor, and in some of the states by an assumed creditor, and be thereupon imprisoned for a certain period of time, and until released by an examination showing that he has no property, except such as is protected to him by law. New states, those of recent settlement, are generally far more liberal in their enactments to the debtor, than are those which, by a series of years, have acquired stability, have increased in population, wealth, and enterprise. This is natural and justifiable, to a certain reasonable extent. In all of the several states an enlarged liberality has always been extended to the honest and unfortunate debtor, and always should be. This is in harmony with public opinion, is in harmony with the sentiments of a very large proportion of those who are creditors. It cannot, however, be denied, that legislation upon this subject has frequently been extended in favor of the debtor to limits unreasonable, and alike injurious to debtor and creditor. In this, as in all other matters of social organization and arrangement, the moderate and reasonable rights and duties of all are to be regarded; and especially important it is, that private and public faith and obligation should not be impaired, hindered, or endangered by legislation. It is a matter of public concernment, that there should be an end of litigation; to accomplish this, statutes of limitation, of repose are prescribed by state legislation, the result of which is, that a party who neglects to assert his rights or title for a prescribed period of time, having an opportunity to assert them, is or may be forever barred. Formerly, in the com-

monwealth of Massachusetts, a party claiming title to land might assert it at any time within sixty years after the creation or origin of the title upon which he relied; now this period is reduced, and limited to one third of that period, after the acquisition of the title. This change has been gradual, and cannot be regarded as adverse or injurious to public or to individual right.

Transactions of a recent date, can generally be the subject of proof and of elucidation; those over which years have passed cannot be, as some of the actors may have passed away, or may be beyond reach; or if found, their recollection of events, of facts, may be feeble or inaccurate. The law extends its protection to the vigilant, it breaks not upon the slumbers of those who voluntarily sleep upon their rights. In relation to matters of a personal nature not connected with land, the periods of limitation, ordinarily, are from one to six years, varying according to the character of the debt, or right, to which they may be applied. In several of the states, obligations under seal, and written obligations not under seal, which are attested by a witness, may be enforced by the party at any time within twenty years. In several of the new states, statutes of limitation applicable to personal obligations are more favorable to the creditor, than they are in the states of earlier origin. The policy of this legislation is conducive to the extension and enlargement of credit, which is an element of prosperity in every state, when guarded and kept within proper limits, and in new states, where capital cannot be abundant, and must be sought and obtained elsewhere, it constitutes an active and important means of advancement. The capacity of persons to contract, is also a subject regulated by state authority, excluding possibly, in some instances, aliens; the age at which minority and its disabilities are determined, and the child released from parental author-

ity, so far as such authority is imposed by law, is determined and fixed by the legislative department of each state for itself. The several states are also clothed with the power of taxation for the support and maintenance of government, for the education of the people, for the construction of roads, for the support of the judiciary, and for all the trusts confided to them. These taxes are direct upon persons, property, occupation, and upon income. They are assessed by the state, by counties, by towns and cities, each assessing for the purposes confided to their several care and action. Generally, every species of property is liable to taxation, although in some of the states the assessments, or a large proportion of them, are assessed upon the land and upon buildings. The power of taxation is limited, and is exercised by those upon whom it operates. A large part of the money raised under this power, is for the municipal and local purposes of the towns, so that the inhabitants, to a great extent, upon whom taxes are levied, determine the amount which shall at any time be assessed, and in various ways they participate in the expenditure of the money raised. The government is clothed with very efficient and speedy means of compelling payment, and frequently takes a precedence or priority over individual claimants, upon the ground that the public interests are more important and essential than any mere individual right. And under some circumstances, the citizen who neglects to pay his tax, is deprived of the right of suffrage. This, at all times, is a powerful inducement to parties to pay, and, at some periods of excitement, is a most successful aid to the government in its collections.

The militia, in some of its features and incidents, is a matter of state authority and regulation, and may appropriately be regarded as a state institution, notwithstanding the qualified authority over it, with which the federal



government is invested. The expense of this establishment is borne in part by the individuals enrolled, and in part by the government. The militia has always been regarded by a great majority of the people with pride and commendation, although many of those enrolled when the country is at peace, manage, on training days, to be absent, and others who may be present, act merely as spectators. In a state of war, every class of the community readily furnishes its quota of men, without reference to personal or party considerations, thus exhibiting an ever present and active regard for their country and its institutions.

Offences are matters of state and of national legislation, each sovereignty providing for those which may occur against its jurisdiction, constitution, or laws. As a general position or principle of law, it may be said that every country, every government, has the exclusive power and authority to say, what shall constitute an offence against itself, how it shall be proved and how punished. No government undertakes to enforce the penal or criminal code, or statutes of another jurisdiction. Under our system, the two governments exercise jurisdiction over the same persons, and over the same territory, but an offence against one sovereignty is not an offence against the other. It has, however, been adjudged that the same act may constitute an offence against the state and the national authority. A party who feloniously takes from the post-office, or from the custody of a mail-carrier, a letter which contains money, may be indicted in a state court, for larceny committed in taking the money contained in the letter, and at the same time in the courts of the United States, for a violation of the laws of the United States regulating the post-office department, and providing for the security of letters and papers transmitted. So far as I have examined, it seems



to be the result of judicial authority that this may be done. In practice, however, ordinarily, after the institution of a criminal proceeding in one court, based upon a particular act, it has not been usual to institute proceedings in the courts of another jurisdiction founded upon the same act. In one case, in which an indictment had been found against a party in a state court, and also in a court of the United States, founded upon one and the same act, the taking of a letter from the post-office by a post-master with intent to destroy the same, and of converting to his own use a bank bill which it contained, the state attorney-general voluntarily abandoned the proceeding which he had instituted in the state court, after the party accused had been arrested by process from a court of the United States.

Notwithstanding the course of judicial proceeding to which reference has been made, from which it is inferred, that the same act may constitute two offences, neither of which is merged in the other, because the act constitutes an offence against each of the two sovereignties; it would be disingenuous in me not to say, I do not perceive the fitness or necessity of creating or deducing from one and the same act two offences. A letter in the post-office is in the custody of the United States; this custody is exclusive of any state control; it may, therefore, without impropriety or inconsistency be said, that a letter in such case, although it contain money or other article of value, so long as it remains in such custody, is without and beyond the jurisdiction of a state and of its judiciary, upon the same principle which is and would be applied to an act done upon territory within the exclusive jurisdiction of the United States, and over which the jurisdiction of a state does not extend. The several state constitutions have made ample provision for the protection of such persons as may be accused. Great

humanity is manifest in all our legislation upon this subject. The party has a right to a definite and accurate statement of the alleged offence; a right to be affronted by his accusers; to have such witnesses and counsel in his behalf as he may produce; to be tried by a jury composed of his neighbors; and every reasonable doubt as to the guilt of a party accused, which may arise upon the proof exhibited against him, is available to his advantage and discharge. In some cases, the party accused has a right to the process and power of the government, by which, at the public cost, he may compel the attendance of his witnesses, and by the usage of the court, in certain cases, is supplied with counsel by appointment of the court, if he does not elect or has no ability to supply his legal adviser from his private resources. The legislation of the several states, to which reference has been made, and of which I have briefly presented some of the most prominent subjects, exhibits in many matters great similarity and uniformity. There are certain fundamental principles of right, of law and justice, which may be applied to every state in the union, uninfluenced by local causes, habits, or climate. In other particulars this similarity does not exist, and cannot, inasmuch as the laws of every state must be established in conformity with the habits, associations, and business of its people, which are influenced by climate, by origin, and by many other causes. This diversity of legislation is a result flowing directly from the existence of different independent sovereignties, whereby a diffusion and division of authority is created; which diffusion and division of power is the main source of the strength and the support of the union.

The law which is administered in the several states is derived from several sources. First and paramount to all other and every other source, is its constitution, against which no other law or official act can avail. Next

in force and effect are the statutes of a state rightfully passed in conformity with its constitution, not violating that of the United States. In addition to these, and where these do not control, resort is and may be had to the common law, and to the usages of trade or of locality. The constitutions and statutes are written; the common law and usages are unwritten.

The common law may be designated as a collection or series of principles, as a collection or series of intendments, deduced from the observation and experience of mankind, as applied to particular facts or relations of life. An individual may hold two offices, or may have two distinct powers or agencies conferred upon him, and may do an act which under one of the offices or powers he may rightfully do, without designating the office or the power under which he assumes to act; in such case, generally, the common law will intend that the individual meant to act under the office or power which authorized the act, so as thereby to render an act available which otherwise might not operate to accomplish the purpose designed. This simple illustration is sufficient to exhibit the basis upon which all legal intendments are made. The common law of many of the several states is derived from the common law of England, and such common law, where it is applicable and not inconsistent with our system of government, our institutions or statutes, is the law daily administered. The common law cannot be applied in opposition to our written constitutions or to our laws, or the policy by which they are dictated.

Usage is another source of right and of law, the nature and character of which is familiar to you; the principle upon which usage is applied to the transactions of life, to the conduct and liabilities of persons, is in harmony with reason, with common sense. If an individual of one place sends merchandise to a merchant or factor resident

at another place for sale, without giving any instruction as to the mode of sale, the consignee may sell it at public sale, through the agency of an auctioneer. upon proof that it is usual and customary, at the place at which the sale is to be made, for consignees of such property to make sales thereof at auction. The principle of this position is a sound one, and is readily understood. If a person at a particular place is requested to do an act, or perform a service, in the absence of instruction or direction to the contrary, he may and should do the act, or perform the service, in the mode in which such acts or services are usually performed. No usage, however, which is illegal, or in violation of an express contract or stipulation of the parties, can be successfully set up. And he who in any case relies upon usage, must show its existence, except in certain cases where the usage has been so frequently proved in court, that it may and will be regarded as known to the court, or as constituting a part of the law-merchant.

The general outline which has been exhibited in this, and in the preceding lecture, exhibits the character and extent of state legislation, and the source or principles of law, from and by which it is carried into effect. This legislation surrounds all the ordinary transactions of the community; the obligations and liabilities resulting from the relations of life, as known to a government based upon the popular will of those subject to its power. This legislation is subject to certain restrictions and prohibitions designed to distinguish and mark the boundary which exists between the national and state jurisdiction, and to secure to the citizens of the several states certain immunities or exemptions from state authority. These restrictions and prohibitions are for the protection of public and of private rights. They are contained in the constitution of the United States, which instrument pro-



vides that congress may at any time by law, make regulations as to the times, places, and manner of holding elections for senators and representatives, or may alter such as may have been established by the legislature of any state, provided that congress shall not interfere as to the place of choosing senators. This power of congress has not been, so far as I know, exercised, and probably no occasion for its exercise will ever occur. The necessity of the power conferred upon congress in this matter is apparent, inasmuch as the several states, if no such power had been conferred upon congress, by neglect to provide for the election of representatives and senators to the congress of the United States, might embarrass and endanger the interests and duties of the federal government. No state shall enter into any treaty, alliance, or confederation, — grant letters of marque and reprisal. No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. These restrictions upon state legislation, constitute the most important and imposing element of the federal jurisdiction; they may be regarded as descriptive of the boundary of the several sovereignties of which the system is composed. They confer upon the federal or national government the entire control of the foreign relations of the country as a whole. The



sagacity which led to the union and to the government, based upon and resulting therefrom, must be conceded from every consideration, however slight, which may be given to the subject. It would be difficult for thirteen, and certainly impracticable for thirty-one or more, independent sovereignties, embracing a continuous territory, having no natural walls or barriers between them, to make the same political arrangements with each other, or with foreign nations. Difference of policy, if the several states were disconnected and at liberty to regulate and negotiate, upon their own suggestion, with their neighbors and others would exist, and not improbably would give rise to collisions and jealousies between them. Territory, foreign to that which appertains to the several states, might furnish inducements to one, or to several of the states, for its trade and friendship, or for its hostility, its subjugation or acquisition, which it would not afford to other of the several states, or which would not arise as the states are now constituted, under and controlled in these matters by the union.

In a disconnected, independent situation, each state acting for itself, the citizens or residents of a state would be more likely and more competent to invent schemes of supposed individual advantage, growing out of the foreign intercourse and relations of the state, which might ultimately prove disastrous and ruinous to the political existence of the state, as a republican government. These supposed difficulties or contingencies are avoided by the restrictions, by which the authority and jurisdiction of a state is prohibited from any and all interference in matters not connected with the domestic and local affairs which arise within and concern its own territory and citizens exclusively. The constitution also provides, that no state shall coin money, or make any thing but gold and silver coin a tender in payment of debts. In a

rude state of society, its trade and business operations are carried on and conducted, to a considerable extent, by the means of barter and exchange. As it progresses in civilization, in wealth, in art and science, such mode of negotiation becomes cumbersome, inadequate, and it is abandoned for the use of gold and silver manufactured or made into coin. Coin, generally, has upon it the head of the sovereign, or some insignia of the government under whose authority it is issued, with a mark or figure showing its legal value. This coin circulates as, and is the money of the country in which it is made, and is regarded as the standard of value in all negotiations. In another stage of society, in which the mercantile and manufacturing interests and the agricultural pursuits become enlarged and extended, banks are established, and their bills, as a matter of consent, are used as substitutes, and as the representatives of gold and silver. In all countries in which gold and silver are used as coin, it is issued under the authority of government, by which its quality and value or denomination is regulated. The external and territorial aspect of the United States is favorable to the residence of a people of the same general habits and views, and the people must, from necessity of position, have intercourse, more or less extended, with each other. This fact shows the expediency and fitness of certainty and uniformity, in those matters which have no peculiar local bearing. The creation and security of money, of coin, is as essential in every state, as it can be in any one of the several states; it was, therefore, of great advantage to the people of the United States, to have its regulation conferred upon the federal government, to the exclusion of the states. Another branch of the same subject is, the mode in which debts may, as matter of right, be paid and discharged. In the early history of the United States, many difficulties were encountered, and

losses sustained, by the inability of the people to perform their promises, to pay their debts; which inability arose from the condition of society and of business generally. In all such emergencies, repudiation is a remedy adopted by many, whose means are inadequate; and whenever a large proportion of the community are surrounded by pecuniary embarrassment, resort is had to stop, to stay-laws; at such times the science of law becomes popular, the aid of lawyers is sought, because the one through the assistance of the others is made available, to furnish the means of paying or of delaying payment of debts until a more convenient season. To obviate these difficulties, to prevent legislation such as I have suggested, the constitution of the United States wisely restrained the power and jurisdiction of the several states, by saying that they should not make any thing except gold and silver, made into coin under the direction of the United States, a legal tender in payment of debt. Every one who reads the early history of the several states, or of any new country, must perceive and admit the force and propriety of the restriction. Another important provision is that which says, no state shall emit bills of credit. This clause of the constitution has been the subject of judicial discussion and decision. Efforts have been made to evade or avoid the provision, and much difference of opinion has been entertained by political and professional persons. Many of the several states have been accustomed to borrow money, and to furnish corporations with their credit; and in so doing, in some instances, have caused great embarrassment and loss, and have, beyond doubt, brought reproach upon our country and its institutions. The loan of money, or the procurement of money by the several states, has been accomplished by the means of bonds and obligations of various kinds, payable or redeemable at a fixed time, or at the pleasure of the state issuing them,

with interest. The words, bills of credit, are of a mercantile character and use, and it is very common for a merchant to authorize another to draw upon him, or upon his foreign banker or correspondent, and to give or furnish a letter of credit, limited or without limit. These obligations of the several states, issued when they effect a loan, or dispose of their responsibility and credit to others, if a close and rigid construction of the constitution of the United States had been adopted, must have been rejected and disallowed as an infringement of the provision in relation to bills of credit. This construction, however, has not been adopted, and it is to be regarded as settled, that the several states may, without doing violence to the constitution of the United States, issue bonds and other obligations, in payment or as evidence of money borrowed for the public use.

This prohibition has generally been approved and commended. One of the writers of the *Federalist*, in its advocacy and support, said, "this prohibition must give pleasure to every citizen, in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace, from the pestilent effects of paper money on the confidence between man and man, on the confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the states chargeable with this unadvised measure, which must long remain unsatisfied, or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it.

In addition to these considerations, it may be observed, that the same reasons which show the necessity of denying to the states the power of regulating coin, prove,



with equal force, that they ought not to be at liberty to substitute a paper medium instead of coin. Had every state a right to regulate the value of its coin, there might be as many different currencies as states, and thus the intercourse among them would be impeded. Retrospective alterations in its value might be made, and thus the citizens of other states be injured, and animosities be kindled among the states themselves. The subjects of foreign powers might suffer from the same cause, and hence the union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the states to emit paper money than to coin gold or silver." From this commentary, which I have copied from the work referred to, it seems, that the design and object of the prohibition upon the states to emit bills of credit, was to prevent the issuing and circulation of paper to be used by the community for its ordinary purposes as money. This is the sense in which the terms have generally been understood; they were so used in relation to the paper currency issued by congress during the revolution, and to similar currency issued by the several states. These words had been used in this manner prior to and at the adoption of the federal constitution, and the fair presumption is, that the adoption of the words was an adoption of the meaning or use which had been applied to them; this is a common and ordinary principle of construction. The late Mr. Justice Story said, upon this subject, that bills of credit, at the adoption of the constitution, were understood to signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society; and in language peculiar to himself, he exhibited the difficulties which had arisen, and which must arise from their use for such purpose.



In a case against the state of Missouri, the supreme court of the United States say, the term "bill of credit" may comprehend any instrument by which a state engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the constitution, and the mischief to be prevented, limit the interpretation of the terms used in the instrument; the word emit is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use. To emit bills of credit conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. The same provision has more recently, in a case against the bank of Kentucky, been before the same court, in which these principles were not denied or rejected; but they were applied, by a majority of the court, to a state of facts, which might well have induced a different application of the principles than was in such case made by the court. The restrictions in relation to money, to the payment of debts, by any thing except gold and silver, to the emission of bills of credit, were designed to uphold private credit, to prevent injustice by any one state to the citizens of another, or to the subjects of foreign countries, who might be induced or permitted to enter into contracts and negotiations with American citizens; they were also designed to restrain, to prevent the several states from embarking in enterprises not essential to the legitimate exercise of their powers of sovereignty. The several states are also prohibited from passing bills of attainder and *ex post facto* laws.

Prior to the union, bills of attainder were frequently passed by the several states to prevent offences against

their sovereignty. Political offences are dangerous matters of legislation, and should not be extended or applied, except to cases of the most urgent necessity. The power of the states to pass such laws, after the adoption of the federal constitution, was not essential to the safety or security of the states, as independent sovereignties, because the United States, in its constitution, entered into a stipulation to maintain in the several states their sovereignty, and a republican form of government.

Laws, designed to operate upon transactions past, and which were not the subject of legal cognizance, at the time of their accomplishment, cannot be made with propriety. Every person is by legal intendment presumed to know what the law is, and is required to regulate his conduct in conformity with his legal duty. Ignorance of law is not, and cannot be regarded as an excuse or justification of its violation. But no one can reasonably or rightfully be expected or required to know what the law may be at a future time. No state is permitted to grant any title of nobility. This prohibition upon state authority has not been so far, in our history, of much practical importance. At the time of the adoption of the constitution of the United States, great fear and jealousy upon this subject was entertained, and much discussion was had in relation to the title which should be conferred upon the chief executive magistrate; these fears and apprehension of danger from such source have been dispelled. A mere title, without political power or dignity, or property connected therewith and resulting from its possession, is of no value, and where these are enjoyed, the title is of little import; a name or title, without political power or dignity or estate, may well be regarded as a reproach to him who assumes or purchases it, or upon whom it may be conferred. The several states are

prohibited from the creation of new states. No new state can be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress. The same principle which restrains the several states from negotiating political contracts with foreign nations, is exhibited in the restrictions in relation to the formation of new states. By the means of these provisions, political aspirations which some of the states might entertain for their own enlargement, aggrandizement, or relative importance, are checked, and each state is thus enabled to pursue its true dignity, by an exercise of its appropriate trusts, and by a watchful regard for the welfare of its citizens. The constitution contains another restriction upon state power which has been the subject of frequent application, and has been of the utmost importance to the security of private right and of public faith. The provision is, "no state shall pass any law impairing the obligation of contracts." It is not natural or easy to suppose, that any free government would undertake by its legislation to interfere with the private contracts of its citizens, in matters appertaining to mere private right. The protection of such right is the primary object of every legitimate government, inasmuch as public right is the result of, and is designed to preserve, individual right. The supreme court of the United States, in its adjudications upon this clause of the constitution, has commended itself to the respect and gratitude of the country. In one of the earliest cases in which the subject was discussed, a statute of Georgia was presented to the court for consideration. This state passed an act authorizing a patent to issue, granting a tract of land lying within the limits of that state; after the patent had been granted, pursuant to the act which

authorized it, the legislature repealed the act. The court determined that this repeal was repugnant to the constitution of the United States, because it impaired the obligation of the contract, which the patent implied.

The title to land, and its acquisition, is a matter of state legislation; but a state or an individual having granted land, and having received a consideration therefor, cannot rightfully resume or impair the grant, because such grant is a contract executed. In another case, the state of New York passed an insolvent law, by which it undertook to discharge debtors from their liabilities incurred prior to its enactment; this statute was regarded as unconstitutional, because it impaired the obligation of contracts, and so far it was adjudicated to be an unauthorized state legislation, and void. Many other cases of similar character have arisen. In all these cases, the state authorities have readily yielded, and the firmness and integrity of the highest judicial tribunal known to our laws, have been admitted.

The most important case in which this clause of the constitution has been discussed, is that commonly called the Dartmouth College Case. This institution had a charter from the British crown prior to the revolution, by and under which property was holden for the benefit of the institution, which had been given by the Earl of Dartmouth and by other individuals. The legislature of New Hampshire undertook to increase the number of the trustees, and to exercise control over the college at its pleasure; this was resisted, and the sanctity of contract, by the decision which was made, was placed upon an enlarged, comprehensive, and firm basis. The effect which has been produced by the principles and reasoning of this case cannot be measured. The case, in its preparation and argument, was conducted on both sides with ability, and by eminent men. The brief in favor of the college

was mainly prepared by an individual who some few years since passed away ; an individual who, when living, as a jurist had no rival, when dead left no superior.\*

The argument upon the same side was made by an individual who has since, and now recently passed away ; although dead, he lives in our recollection, in his public works, in his public acts ; he lives in the influence which those works, those acts will exert upon our constitution and the institutions which it upholds.†

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\* Hon. Jeremiah Mason ; he was assisted by Hon. Jeremiah Smith.

† Hon. Daniel Webster.





## LECTURE VIII.

THE FEDERAL AND STATE JUDICIAL DEPARTMENTS.—IN GENERAL TERMS, THE BOUNDARY BETWEEN THEM MAY BE DESCRIBED BY SAYING, THE FEDERAL JUDICIARY IS INTRUSTED WITH THE FINAL AND CONCLUSIVE ADJUDICATION OF ALL MATTERS ARISING UNDER OR DEPENDENT UPON THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES, OR THE LAW OF NATIONS.—THE STATE JUDICIARY IS INTRUSTED WITH THE FINAL AND CONCLUSIVE ADJUDICATION OF ALL MATTERS WHICH DO NOT ARISE UNDER OR DEPEND UPON THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES, OR THE LAW OF NATIONS.\*

LIBERTY is a relative term. Some persons regard it as a right in every individual to act in accordance with his own judgment. Such liberty is unknown to, and cannot be found in connection with, or as the result of government, or of the law of society. Government and societies are established for the regulation of social intercourse, of social institutions. Civil liberty is not dependent upon any particular form or system to the exclusion of every other. The purpose of legitimate government is the protection of person, character, and property. This

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\* In speaking of the legislative department, I used the terms "supreme and exclusive." In relation to the judiciary, I use the terms "final and conclusive," not from any difference in the extent of the different powers, but because a difference exists in the form in which they may be rendered available. Some suits, commenced in a state court, may be transferred to a court of the United States. In a class of cases the supreme court of the United States may review the decisions of a state court by writ of error.

may be extended to the citizen by an absolute government. Experience and history, however, admonish us, that such government does not ordinarily afford such protection, and cannot with safety be relied upon. Protection may be extended to the citizen of a constitutional government, in which few only of the people exercise any control. Certainty of protection to person, character, and property, can only be attained in a government in which all the people, or a very large proportion of them, exercise an influence in the establishment and in the management of the public trusts, and in which these trusts and the will of the people are carried into effect through the instrumentality of different institutions or departments. Our system, as has been suggested, is composed of different sovereignties, each sovereignty having its own departments and division of power. The legislative, judicial, and executive departments are equal in rank and dignity. They are independent of each other, and are charged with distinct and different trusts. The laws are established by the first, construed by the second, and executed by the third. This is familiar to you; the machinery is simple, and you perceive without difficulty how these departments, parts of an entire and of the same system, act in harmony with each other. The suggestion of collision, of conflict between these departments, is not often made. The legislative department is governed in its action by a constitution, and by certain fixed principles, within which it incurs no responsibility to, or danger of resistance from, any other department. And so long as its action is restricted within the limits imposed, its decrees constitute the law of the sovereignty to which it appertains. Whenever it disregards and goes beyond these limits, its decrees are of no force, and they may and will be declared by another department void and of no effect. The judicial department is not intrusted with

power to say what the law shall be upon any subject ; it may and must say what the law is. It determines the rights of individuals ; it determines the nature and extent of obligation, which society, through its legislative department, has imposed upon its members. It controls the action of officers in all matters in relation to which they are not clothed with personal discretion. It restrains such discretion within constitutional and legal limits. It determines whether the legislative department has or has not in any particular transcended its rightful jurisdiction. The executive department is bound to see that the laws are executed and carried into effect, so far as they concern the public interest or the public peace, and to suppress all and every individual effort which may be made, by any member or members of the community, to assert his or their actual or supposed rights, in a mode not warranted by law. No person is allowed to be his own avenger, or to take the law into his own hands. He must resort to the departments to which reference has been made ; he must seek protection in and from the institutions established or permitted by government.

I have thus stated the outline of these departments, for the purpose of deducing or exhibiting an analogy therefrom, which may illustrate our system, composed of two sovereignties. The several departments of which I have spoken act harmoniously and in unison, because they act for different purposes, although they act upon the same territory, upon the same persons, upon the same contracts, and upon the same things. Equally simple and consistent it is to say and to perceive, that two sovereignties acting upon the same territory, upon the same persons and things, for distinct and separate purposes, may act in unison and in harmony with each other. The national government, through the instrumentality of its legislative, judicial, and executive departments, may

enact, construe, and execute a statute within and upon any subject confided to its jurisdiction. The state government, through its legislative, judicial, and executive departments, upon any subject confided to its jurisdiction, may enact, construe, and carry into effect a statute. No difficulty arises or can arise between the two sovereignties, because they act upon different subjects or for different purposes.\*

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\* Law Reporter, New Series, vol. iv. p. 335. Boston, October, 1851.— *Conflict of Laws. — Federal and State Sovereignty. — Opinion of Charles B. Goodrich.*

*Case Stated.* — “Thomas Sims, said to be a fugitive from service or labor, due to a citizen of the state of Georgia, is now in the actual custody of Charles Devens, marshal of the United States, by virtue of an order or warrant issued by a commissioner of the United States, upon the application of the party, by his agent, to which the service is said to be due. He is also in the custody of said Devens, under and by virtue of an order or warrant issued by a commissioner of the United States, founded upon a complaint against Sims, for an alleged criminal offence against the laws of the United States.”

*Questions Proposed.* — “1st. Has the sheriff of Suffolk county, a state officer, by himself or deputy, a legal right, by virtue of process, civil or criminal, issued by and under the authority of the commonwealth of Massachusetts, to arrest and take the said Sims, from the custody of said Devens, against his consent, and for that purpose use such force as may be requisite to accomplish such seizure?”

“2d. Suppose the criminal process in the hands of Devens shall be released, abandoned, or in any manner become inoperative, — the said Devens retaining the said Sims under the process by which he holds him as an alleged fugitive, — has the sheriff or his deputy, in such event, by virtue of state process, civil or criminal, a legal right to seize said Sims, and to use such force as may be adequate to divest the custody of said Devens?”

*Opinion.* — “I have examined and carefully considered the two questions upon which an opinion is asked. I have no hesitation or doubt, in relation to the law applicable to the case stated in either aspect exhibited. The sheriff has no legal right or authority to divest the custody of the marshal of the United States, against his consent, under the state of facts presented in either of the questions proposed. If such attempt to use force should be made by the sheriff, it will be the right and duty of the marshal to resist, at all hazards, and the processes in the hands of the sheriff will afford him no protection for any consequence which may result from such a conflict of force. I suppose any person, even slightly conversant with the principles of jurisprudence, would readily answer the first inquiry as I have answered it. The solution of the second



No system of government is perfect, no system of government can at all times and under all circumstances,

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question is equally simple and clear, as is that of the first. Upon this, however, I am aware, a different opinion has been expressed by gentlemen of the legal profession, basing their opinion upon an assumption, that criminal process will defeat and override civil process. I will, therefore, state some of the reasons of my opinion upon the second question. The inquiry which results from the case stated, in its second supposed aspect, is not whether criminal process is paramount to civil process. It is whether the commonwealth of Massachusetts can, by force, legally and rightfully dispossess the United States of a person of which the United States, by its officer, under its laws, has actual custody and possession. It is distinctly a question of sovereignty. The use or purpose to which the United States, the sovereignty in actual possession, may desire to devote the person which is in such possession, the use or purpose to which the commonwealth of Massachusetts may design to appropriate the person, when the commonwealth shall have obtained the same, are collateral and immaterial matters, when discussing the question whether the commonwealth, by its officers, may legally use force to acquire the possession.

“The use and purpose of Massachusetts must be deferred until the use and purpose of the United States shall, in some legal manner, be compensated, satisfied, or released; or until some judicial tribunal, having authority in the premises, shall adjudicate that the claim of Massachusetts is paramount to that of the United States, and thereupon stay or release, temporarily or permanently, as the case may be, the custody of the United States. The marshal of the United States, in relation to process in his hands, civil or criminal, is subject to the action and control of the judiciary of the United States, and if the commonwealth of Massachusetts has a title to person or property, in the hands of the marshal, paramount, in a legal view, to the title of the marshal, the courts of the United States are competent to direct him to deliver the person or property so held by him, to those having the paramount title. The result at which I have arrived, may be illustrated by a variety of considerations, by every consideration which can legally be applied to the subject of discussion. The great argument, in opposition to the view presented, is that criminal process is and must be paramount to civil process. It is so when the civil and criminal processes issue from the same sovereign. The commonwealth of Massachusetts, when it has a person or property in its custody and control, which is liable to several distinct obligations, some of a private character, some of a public nature, may well say, in conformity with its own laws, to which obligation, the person or property shall be applied. It may well say its civil process shall be merged, suspended, or postponed by its criminal process and its exigencies. It cannot say, that the sovereignty of the United States, which has once rightfully attached to person or property, may legally be divested by force.

“If the supposed right of Massachusetts is paramount, upon legal principles, to that of the United States, its remedy is by application to the judiciary of

accomplish every purpose which it might be convenient or desirable to have accomplished. Under our system,

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the United States, which, if the assumption of the commonwealth be well founded in law, will direct its officer and those acting under the authority of the United States to withdraw. The same result flows from the character of the authority which the law reposes in the sheriff. His official duties are circumscribed in their exercise to and within his legal precinct. The term 'precinct,' is technical, and in the English and in the American law ordinarily means a district, or a certain defined territory. This is not its only meaning; and in the complex system of government, under which the American people live, *ex necessitate*, must and does have a more extensive and a broader import. The precinct of the sheriff, territorially, embraces the county of Suffolk, and, in some specified cases, not material to the present inquiry, is extended beyond. So the precinct of the marshal of the United States embraces the same territory. When the marshal seizes person or property, within the territory common to both sovereignties, that of the United States, and of the state, *quoad* such person or property, they are, during the continuance of such seizure, without the legal precinct of the sheriff; when the sheriff makes the first seizure, and thereby has possession, the same result occurs as to the rights of the marshal.

"So it is a principle well established, that when two jurisdictions have concurrent authority, the one which is first exercised, so as effectually to attach, is no longer concurrent with, but becomes and is exclusive of the other. In a single word, every independent sovereignty is the exclusive judge of its own powers, and may and must determine the extent thereof, and will, so far as legal right is concerned, so determine, until put down, not by right, but by force—when its independence, its sovereignty will cease to exist. The result is therefore irresistible, that, when the marshal of the United States has a person in custody, under process issued by authority of the United States, a sheriff of the commonwealth of Massachusetts, with a state process against the same person, cannot, by force, legally divest such custody for any purpose. Assume that the purpose to be accomplished by the state process is of more importance than the purpose of the process in the hands of the marshal, and is paramount thereto, the marshal may entertain a different opinion and act upon it. Neither the marshal nor the sheriff is charged by law with the responsibility of deciding at their peril any such difference of opinion or dispute. The marshal being in possession, has the legal right, until some judicial tribunal, having authority in the premises, shall adjudge that his title must yield to some other. These views are sustained by legal and constitutional authority; they constitute and result from the principles upon which our institutions stand, and upon which alone they can successfully stand.

"In a case before the late Mr. Justice Story, *The Invincible*, (2 Gallison, 44,) the court say, 'The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign.'

"In *The United States v. Peters*, (5 Cranch, 115,) chief justice Marshall, in

the rightful purpose or enactment of one and of the other sovereignty may fail of effect, from an inability to

giving the opinion of the court, says, 'The legislature of a state cannot annul the judgment, nor determine the jurisdiction of the courts of the United States; if so, the constitution becomes a solemn mockery.'

"In *Peck v. Jenness*, (7 Howard, 624, 625,) the court adjudicate, in conformity with its previous uniform course of decision, that the courts of the United States cannot seize upon property in the custody of the officers of a state court, which had rightfully attached. The court in its judgment says, 'Where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.'

"In *Brown v. Clarke*, (4 Howard, 4,) the court say, 'In cases of conflicting executions issued out of the federal and state courts, a priority is given to that under which there is an actual seizure of the property first.'

"In *Hagan v. Lucas*, (10 Peters, 493,) it is said, 'Had the property remained in the possession of the sheriff, under the first levy, it is clear the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff having execution in his hands, may levy on the same goods; and where there is no priority on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions; and where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain after satisfying the first levy, by the order of the court. But the same rule does not govern where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys collected under several executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff. A most injurious conflict of jurisdiction would be likely often to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist. Property once levied on remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a dif-

reach the person or thing, upon or by which it can only be accomplished. If one sovereignty has in its actual custody by process, or other rightful authority, any person or thing, the other sovereignty cannot at the same time have the actual custody of the same person or thing. The two sovereignties which compose our system, like the planets, have similar orbits, but not the same. Except an occasional diminution or withdrawal of the subject-matter of power, or a withdrawal of the material upon

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ferent officer, and especially by an officer acting under a different jurisdiction.'

"In the case, *Ex parte Dorr*, (3 Howard, 105,) the language of the court is decisive: 'Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual who may be indicted in a circuit court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a state. Dorr is in confinement under the sentence of the supreme court of Rhode Island, consequently this court has no power to issue a *habeas corpus* to bring him before it.'

"Burge, in his treatise upon the conflict of laws, referring to the civil law for his authority, says — 'It is a fundamental principle essential to the sovereignty of every independent state, that no municipal law, whatever be its nature or object, should, *proprio vigore*, extend beyond the limits of that state by which it has been established. The limits of its operation are those of the authority by which it is imposed.'

"Cases in abundance, decided by state courts, as well as cases decided by the courts of the United States, may be cited in consonance with the views which are here presented. The question whether criminal process is paramount to civil, as already stated, does not and cannot arise, in discussing the questions proposed. State them in any and in every aspect in which they can be stated, and the result is a question of sovereignty. It is, whether the commonwealth of Massachusetts can legally, by force, put down the constitution, the laws, the judiciary of the United States. I have no hesitancy in saying it cannot. If the marshal of the United States thinks fit to resist any and every forcible effort which may be made, if any shall be, to divest him of his custody, even although he hold only the fugitive warrant, until he shall be directed to surrender by some judicial tribunal having jurisdiction in the matter, no state process can be of any avail to shield or protect him who shall thus assail the marshal, and, through him, the sovereignty whose process he holds."



which power would otherwise act, I do not discover any inadequacy or incompleteness, or cause of conflict, in the great outlines of our complex system. The legislative departments of the federal and of the several state governments, have been considered.

I proceed to make some suggestions upon the judicial department. Three things are essential to its existence, as a competent and beneficial department. Its powers must be commensurate, coextensive with the power of the sovereignty of which it is a part. If its action be confined only to a portion of the matters to which the legislative and executive departments extend, the system must be incomplete, and inadequate to its purpose. In this respect, no defect appears; the several departments, as they are constituted in our constitutions, have the required extent of power. Another essential element of the judicial department is, an independence of popular caprice, independence of power, public or private, except such as is prescribed by the law of its creation. It has generally been supposed that this can be attained by conferring upon the most elevated judicial officers permanence of place, with an ample provision for their respectable and comfortable support. In accordance with this view, judges generally, heretofore, have held their stations limited in duration by their fidelity and good conduct. The compensation has, in most instances, been inadequate to answer the reasonable expectation of those most suited, from ability and from study, to administer justice with an even hand, without fear, favor, affection, or the hope of reward. The third element, without which the judiciary must become a reproach, is, the integrity of those intrusted with its important and responsible duties. This can ordinarily be attained by selecting learned and eminent individuals, conferring upon them permanence of



place, and an ample and full compensation, which will enable them to provide for themselves and their families a respectable position in society. The judicial department of the United States is coextensive in power with the jurisdiction of the sovereignty of which it is a component branch. The constitution of the United States provides, that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Under this provision, the supreme court of the United States, circuit courts, and district courts, have been established, the general construction of which has been given in a previous lecture. The provision recited relates to the tribunals, the machinery, by which the judicial power of the government is to be executed. The extent and subject-matter of the judicial power is defined in the constitution in these words: "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and a citizen of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects. From the clause recited, it appears that the judicial power of the

United States extends to all the matters therein enumerated; consequently the judicial power of the United States, in relation to any of the subjects upon which it may act, whenever it is exercised, must be and is final and conclusive. If it extends to a particular matter or case, and its action thereupon or therein may be reviewed, examined, or controlled by another sovereignty, or by the action of any other department, the power is valueless, and the United States would be deprived of self-protection, and would be unable to execute its trusts. Although the judicial power of the United States, in all matters to which it extends, is and must be final and conclusive, it does not follow that the courts of the several states may not, in the first instance, in some cases, act upon the same matters, unless, from the nature of the case, its jurisdiction is excluded upon the ground that the matter did not arise within the local jurisdiction of any state. A citizen of one state may institute a suit against a citizen of another state, in a state court, and unless it be transferred under a law of the United States, as in some instances it may be, the state court has jurisdiction to proceed, notwithstanding the judicial power of the United States, may, under its constitution, extend to such case. An ambassador, although entitled to the protection of the United States and of its courts, may voluntarily, if he will, resort to a state court for redress of any wrong done to him. In relation to some other cases named in the clause, the jurisdiction of the judicial power of the United States is exclusive, from the nature of the subject-matter. Causes of admiralty and maritime jurisdiction arising upon the high seas, and without the territorial limits of a state, must be instituted in the courts of the United States, if the party instituting a proceeding wishes to obtain such redress as courts of admiralty alone are competent to afford. In relation to some of the

cases enumerated, (in the clause recited,) the supreme court of the United States has original, in others it has an appellate, or supervisory jurisdiction, from and over other courts of the United States. In some of the cases which may arise coming within the subjects enumerated, in courts of a state, provision is made by the laws of the United States, to transfer them to a court of the United States, before any hearing upon the merits shall have been had, or after a hearing in a state court, to remove them by writ of error to the supreme court of the United States. It is not necessary, and would not be useful, for me to exhibit these matters in detail, with their limitations, or to present the course of proceeding. The result is, that individuals having rights growing out of the matters enumerated, by pursuing the course prescribed by law, may have them finally and conclusively adjudicated by the courts of the United States, without review or examination elsewhere.

The provision to which reference has been made exhibits the character of our system, and may well be resorted to as its exponent. It exhibits an intention to accomplish several important purposes. *First.* The sovereignty of the United States depends for its security not upon state authority or state courts, but upon itself, upon its own action. The clause under consideration says, the judicial power shall extend to all cases arising under the constitution, under the laws of the United States, and to cases in which the United States may be a party. It is a general principle of law applicable to every system of government, that it is and shall be the interpreter of its own constitution, of its own law, and of the benefits resulting from or conceded by its institutions. The federal government, within its limit, within its rightful jurisdiction, knows no other government, submits to no other power. In accordance with this general principle, it is

intrusted with the keeping of its own supremacy, with the protection and assertion of all rights which may arise or exist under its constitution and laws, and also of the rights which the United States may have as a party. Another purpose disclosed, is connected with the foreign policy and relations of the country. All matters growing out of or appertaining to treaties, ambassadors, or other public ministers, are within the judicial power of the United States, as already stated; and thereby uniformity and certainty in these matters are obtained, and the country is protected from interposition or inadequacy, or want of faith on the part of any state authority. A third intent is, that the law of nations and rights dependent thereupon may be respected and administered by the courts of the government, which is charged with an adherence to and maintenance of such rights, by itself and by its citizens, and by the residents of the United States.

A fourth and important purpose is manifested in the provision which extends the jurisdiction of the judicial department of the United States to controversies which may arise between the several states as sovereignties. If the rights of boundary, or other rights which may be contested between two states were to be left to the several states interested for determination, they might be induced to resort to force, and our system would end. Or if such rights were to be determined by the courts of either of the states litigating with each other, or by the courts of a disinterested neighboring state, jealousy, confusion, and ill feeling would arise. As these matters are deferred to the judiciary of the union, the several states stand as equals, and their dignity and self-respect is not impaired. Many such cases have arisen under our system; and although occasionally storms and clouds have appeared in the distance, sober second thought has pre-



vailed, and the mandates of the supreme court of the United States have thus far been carried into effect without collision or rupture between the states, or between them and the union. A similar purpose is found in the provision which authorizes citizens of different states, or citizens of the same state claiming grants of land under different states, to litigate their rights in the courts of the United States. Another purpose exhibited in the clause is, a desire to prevent a state or its citizens from doing injustice to a foreign state, or to the citizens or subjects of a foreign state.

Soon after the adoption of the constitution, it was doubted whether a state could be sued by a citizen of another state. The right was denied by many persons of ability; and the language of the constitution is such, regarding its subject-matter, (a sovereign state,) that doubts in this respect might well and fairly have been entertained. The language is, the judicial power shall extend to controversies between a state and citizens of another state. Nothing is said as to the institution of a controversy or suit by a state; so that the language, in its natural and broad import, applies to all controversies between a state and the citizens of another state. It was conceded by those who took a narrow view, that a state might commence a suit against a citizen of another state, but it was assumed that it could not be sued by such citizen. This assumption or doubt was the result of state dignity and state pride. In a case instituted against the state of Georgia, at an early stage of our constitutional history, a majority of the supreme court, adopting the ordinary and natural import of the words, without reference to the sovereign authority to and upon which it applied, held, that a state might be sued by a citizen of another state. This decision, generally, so far as I am aware, has been approved by the legal



mind. To obviate the supposed inconvenience and enormity of this decision, and to avoid embarrassments which it was supposed might arise, the constitution was amended. In an amendment of the constitution of the United States upon this subject, it is provided, "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. This amendment prohibits the institution of legal proceedings against a state, by a citizen of another state. If a state institutes a suit against a citizen of another state, such citizen, notwithstanding the amendment, may carry the case, if decided against him, to the supreme court of the United States for final adjudication. As the constitution originally existed, a foreign state or sovereignty having a legal claim against any one of the several states, arising upon bond or other obligation of a state for the payment of money or for the performance of a contract, not in its nature political, might institute legal proceedings against such state, in the supreme court of the United States. The amendment of the constitution prohibiting the institution of a suit against a state by a citizen of another state, or by a citizen or subject of a foreign state, does not reach the case of a suit by a foreign sovereignty. If a state by contract becomes indebted to a foreign government or sovereignty, I do not perceive any reason upon which to say such foreign government cannot assert its rights against such state by the institution of legal proceedings. The amendment, through design or inadvertence, does not extend to or exclude such case; no such suit has been attempted, and probably may not be.

Immediately after the adoption of the constitution, in obedience to its requirement, congress provided for the

organization of a supreme court and for the establishment of inferior courts, distributing the jurisdiction, so as to make ample provision for carrying into effect the design and powers of the constitution. In some instances, state officers have voluntarily, under laws of the United States, aided in the execution of such laws. State officers cannot be required to perform any duty, except such as may be conferred upon them by state legislation. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself. By an act passed in 1789, commonly known as the judiciary act, the judges of the courts of the United States were vested with ample means to exercise the jurisdiction conferred upon them. The existence of two judicial departments exercising jurisdiction over the same territory and persons, may appear inconsistent or incompatible with a natural and regular system. The same answer occurs which has been applied, and is applicable to the existence of two legislative departments, acting under different sovereignties and circumstances, for different purposes.

As has been suggested, the judicial department of the United States has been constructed so as to secure certain important and national objects, which are not merely local or exclusively applicable to the condition or exigencies of a particular state. It is not difficult to understand an arrangement by which one court may be authorized to determine a particular class of cases or controversies, and another court be empowered to adjudicate in relation to another and distinct class of cases. Upon the same principle, the judiciary of the United States may be intrusted with the original and exclusive, or the final and conclusive jurisdiction of certain matters, at the same time that other matters are deferred to the control and disposition of a state judiciary. The science of law,

the principles of right and wrong, independent of express regulation or statute provision, is and are the same in every free or constitutional government, and in every intelligent judiciary. To secure this uniformity of science, of right and wrong, in and through the relations of the citizens of the United States, to the system of government which they have adopted, the laws of the United States have made ample provision. The judiciary act, to which reference has been made, provides, that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law in courts of the United States, in cases where they apply." This provision relates to suits and controversies arising at common law, in respect to which the states may rightfully legislate within certain limits. A contract may be made by citizens of Massachusetts, in conformity with the laws, and to be performed within the territory of the commonwealth. Such contract, so far as the rights which result or flow therefrom, is to be determined upon the same principles, when discussed in the courts of the United States, as when discussed in a state court. More than this, a statute of any one state rightfully and constitutionally enacted, means in every other state of the union, and in the courts of the United States the same; and has the same force and effect as the highest judicial tribunal of the state, in which it may have been enacted, may determine. In other words, the law of a particular sovereignty or government, must be determined by such sovereignty or government. In one case which arose before the supreme court of the United States, a state statute was the subject of construction; the court, in pursuance of the provision in the laws of the United States to which reference has been made, and in harmony with admitted principles of

jurisprudence, adopted, as the law of the court, a construction which the supreme court of a state had given of its own statute.

Subsequently the same statute was presented in another case before the supreme court of the United States, and in the meantime, the same statute had been presented to the state court a second time, for construction, and its former opinion was rejected as erroneous, and a new and different construction was adopted as the true import and meaning of the statute; which last construction was adopted by the supreme court of the United States as the true exposition, in deference to the judgment of the state court. Other cases arise which are controlled by the constitution, by the treaties, or by the laws of the United States; these are to be decided at all times and in all courts and in every court in the country, in which they may be discussed, in conformity with the opinion of the supreme court of the United States, if it can be ascertained; and if no opinion has been given by that court, they are to be determined upon principles which it may be supposed that court would adopt, if the question presented had arisen before it. Another class of cases may arise, dependent for determination upon general principles of jurisprudence as understood by jurists, judges, and legal writers. In such cases the judiciary of the United States will be governed by its own intelligence and knowledge of legal principle, and will defer only to the opinions or judgments of state courts, as the opinions of eminent and learned men, entitled to such respect and consideration, and only such, as their reasoning may produce upon other minds. The judicial department of the United States extends also to cases in equity, which is a branch or department of legal science, of jurisprudence not dependent upon any written law, or upon any arbitrary, fixed principles, which do not admit of any



diminution or abatement. Equity, however, cannot do away with or control positive written law, but it may restrain and prohibit, under some circumstances, the application of written law to a particular case. This branch of law has been the subject of much reproach, which it is not my province to repel, except so far as an illustration of its operation may have such effect.

It may be essential to the rights of an individual to prove a certain state of facts, or the existence or execution of a paper, of which he has at law no means of proof, no evidence at his hand ; these facts, or the execution of the paper are known, to his adversary, to the party having an interest to conceal the facts or to suppress the paper ; the individual wishing the proof may, through the instrumentality and aid of a court of equity, resort to the party opposed, make an appeal to his conscience, and compel him upon oath to answer. In this way injustice has been prevented, and right has prevailed in many cases. Individuals may enter into a written contract, which through inadvertence and mistake may contain a provision which neither party designed to have inserted ; upon proof of such mutual mistake, a court of equity will reform the instrument, and make it what the parties thereto originally designed. From this brief statement of the character of equity as a part of our system of jurisprudence, it will be perceived that the courts of the United States, in adjudicating upon cases in equity, must resort to the science for their guide, and not to state courts, some of which have, and some have not, equity jurisdiction. Courts of equity do not afford relief, in cases in which the jurisdiction of the ordinary courts of common law is adequate to attain the ends of justice by affording ample remedy. The judiciary of the United States, in equity cases, proceeds in conformity with the principles of equity, as known to, and as administered in,



courts of equity ; and as there is no court of equity to which the supreme court of the United States can resort, as an authoritative tribunal, and as it would be indecorous to resort to a court of any particular state, in preference to, and in exclusion of, the court of any other state, equally respectable in the theory of our system, the principles of the English court of equity have been adopted, except so far as those principles may be inapplicable to, or inconsistent with, our institutions. The judiciary of the United States extends to all cases of admiralty and maritime jurisdiction. The state courts do not act as courts of admiralty, and the courts of the United States, in exercising its admiralty and maritime jurisdiction, look to the courts of admiralty of other countries and to the law of nations, for the principles by which their action and adjudications are governed, unless restrained by some statute.

The imposition of this jurisdiction upon the courts of the federal sovereignty, shows the sagacity of those who framed our system, and exhibits the competency of the system to answer the purpose for which the union was formed. Cases of admiralty and maritime jurisdiction arise frequently in time of war, and out of matters dependent entirely upon international law, or upon the force and effect of treaties. These cannot safely be intrusted to thirty-one or more different jurisdictions, independent of each other, occupying a continuous territory, although composed of people of similar interests and habits, modified slightly by locality or climate. The judgments of courts, proceeding according to the law of nations, having jurisdiction of the subject-matter to the extent of the jurisdiction actually exercised, are binding, and to be regarded upon and by all other courts. It cannot, therefore, fail to be perceived, that such cases should have been as they have been, conferred upon the federal judiciary.

It is frequently said, that the United States have no common law. In one sense, the remark is undoubtedly true. The several states may have a common law, composed of usage and custom, peculiar to the state in which it exists. It cannot, therefore, be said that the judiciary of the United States shall in all cases adopt the common law of any particular state, to the exclusion of that of other states. The judiciary of the United States, however, may and it will adopt, when not controlled by any constitution, treaty, or statute, those common law principles, which may be a result of, or deduction from, the highest attainable point of human reason, chastened and controlled by integrity, by principles of justice and of right.

The judicial department of the United States exhibits another peculiarity or incident resulting from our system, composed as it is of two sovereignties. The forms of writs, executions, and processes, in and from the courts of the United States, except their style, and the forms and modes of proceeding in suits at common law, in these courts, are and shall be the same in each state respectively as are used in the supreme court thereof. A provision to this effect was made by Congress in 1789, and applied only to the states which were then members of the union, and to the terms and mode of proceeding then used and existing in the state courts.

In 1828, and subsequently, provision was made in the statutes of the United States for extending the regulation to the new states, and to conform to the changes which the several states in this particular had made since 1789. The object of this legislation is, to procure uniformity in the course and mode of proceeding in the national and state judiciary, and thereby avoid occasions for distrust or uneasiness which might otherwise occur.\*

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\* An opinion is prevalent, more or less extensive, among the legal profession,

The judges of the supreme court of the United States hold the circuit courts in the several states, and thus have an opportunity to learn the practical effect and working of the law and of the system. They become familiar with the business operations of the community, with the habits and thoughts of the people upon which the law operates, and for whose protection it is established. By means of this observation and intercourse, the judges acquire a comprehensive knowledge of men

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that a party who institutes a suit in the courts of the United States, may have greater right than he can by instituting his suit in a state court. This is erroneous, and has no foundation. It is a general and undoubted principle of jurisprudence, that a party who institutes a suit in a foreign country, must be content to receive such law and such remedy as the courts of the country in which he litigates may be able or may be disposed to extend to him. The reason of which is, that the party in the case supposed, proceeds not as matter of right, but upon the comity of the country whose courts he may enter. This principle cannot be applied to citizens of the several states of the American union. A citizen of one state who has a claim against a citizen of another, and resorts to the state court of the state of which the latter is a citizen or a resident, does so as matter of right, under the constitution of the United States, and not as matter of grace; he is, therefore, entitled to the same rights as he might have, if he had instituted his suit in a court of the United States. The several state courts are bound by the constitution and laws of the United States to the same extent as the courts of the United States are; and if a suitor has any peculiar protection, immunity, or right under the constitution, treaties, or laws of the United States, a state court is bound to give effect thereto. This is applicable to cases in which a state court may exercise jurisdiction, and not of course to admiralty and maritime cases, or to other cases in which the state courts have no power to afford the remedy peculiar to courts of admiralty, or to some other court exercising a peculiar mode of remedy. It is also a general principle of jurisprudence, that the force and effect of a contract is to be ascertained from and by the law of the country in which it may have been made, and if legal there, is legal in every other country. A contract, however, which may be legal where made, will not, in all cases, be enforced in every other country. A promissory note may be legally made in any one of the several states in which slavery is allowed, as and in payment of the purchase-money for a slave. If such note should be put in suit in any of the courts of common law of England, the court might well, and probably would, say, it is against good morals, and a prejudice to our institutions to enforce such contract, and therefore and thereupon refuse to enforce it. If such note should be put in suit in the state court of a state in this union in which slavery is not allowed, no such answer or refusal to enforce the contract could be made.

and things, which is essential to a proper discharge of the trusts confided to them, which cannot be acquired from books. The judiciary of the United States is clothed with ample power to aid and uphold the government in the collection of debts due to it. It is provided by law, "that all writs of execution upon any judgment obtained for the use of the United States in any of the courts of the United States in one state, may run and be executed in any other state, or in any of the territories of the United States, but shall be issued from and made returnable to the court in which the judgment was obtained. It has also very extensive power and authority, which may be used in favor of individual, of private right. Process for witnesses who may be required to attend a court of the United States in any district thereof, may run into any other district, when their attendance is required in criminal causes. In civil causes, the attendance of witnesses who do not reside at a greater distance than one hundred miles from the place of trial may be compelled, although they reside in a state or district other than that in which a trial is to be had. The judiciary of the United States extends to all crimes and offences against the constitution, the treaties, or laws of the United States; to offences which may occur upon territory, over which the United States have exclusive jurisdiction; to offences on the high seas, without the local limits of a state, which may be committed on board an American ship; to offences against the law of nations, committed by its citizens, or by persons rightfully brought within the United States. The constitutional provisions, in relation to offences known to the laws of the United States, are well calculated to insure civil liberty, and to preserve inviolate the humanity and rights which is and are due to those accused. The constitution of the United States provides, that "the privilege of the writ of *habeas corpus* shall not



be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed. The power and danger of oppression on the part of the government, in relation to political offences, is restrained and prevented. In arbitrary or absolute governments, an accusation of treason is an easy and dangerous method of suppressing inquiry into the conduct of government, and of imposing upon those suspected of hostility to its measures, unusual and unwarrantable penalties. In our system, this is avoided. Treason is defined by the constitution, which says, treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. This provision results from an enlarged comprehension of the true character and purpose of civil liberty, and an unwavering attachment to its support and regulation by law. To extend and sustain the enlightened policy exhibited in the constitution by the provisions referred to, additional provisions were adopted by amendment.

In the articles of amendment it is said, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." Several other similar provisions, designed to uphold, under all circumstances, security of



person and personal rights, are also inserted. The legislation of congress in the establishment of the federal judiciary has clothed it with every power and facility, which can be required to carry into effect the principles of the constitution. The character of the state judiciary may be inferred from that of the federal government. The federal judiciary is for national purposes, for purposes arising from and connected with the union. The state judiciary is for local, for state purposes. Each pursues its several and rightful jurisdiction, independent of the other, as a means or instrument by which the trusts of the sovereignty to which it belongs are ascertained, defined, and made available to the security and progress of society. The state judiciary has power commensurate with the jurisdiction of the state. It pronounces judgment upon the force and effect of the state constitution, and of the laws of the state, written and unwritten, including its local usages and customs, and applies them to the rights of the state government, and to the rights, duties, and obligations of its citizens, limited only in these particulars, by the restrictions contained in the constitution of the United States, designed to uphold the union. It has a supervisory power and control over municipal corporations and officers, and others intrusted with public authority ; and generally it determines the rights, public and private, of the community. The judicial department of the state government operates extensively and constantly upon all the relations of life. It is eminently the department to which the citizen recurs for the protection and enjoyment of his civil rights. The rights of persons, character, and property, the incidents resulting from contract, are generally ascertained and enforced by the state judiciary. They are exclusively and conclusively determined by this department in all cases, and matters not

conferred upon the federal government for the purposes of the union. The execution of wills, the acquisition of land, the mode in which the title to personal estate may be acquired or lost, are matters of state legislation, and whenever they may be the subject of judicial inquiry it is had, ordinarily and generally, in a state court. The judicial department of the several states, in its power and purpose, is the same substantially in every state. Its organization and construction is not uniform, each state adopting such distribution of jurisdiction and mode of proceeding as may be convenient or satisfactory to itself. In every state, there is a tribunal which exercises the final control over all other state courts and judicial officers. This court of last resort is in some of the states designated the court of errors, or the court of appeals; in other states it is designated the supreme, or the superior court. In some of the states, the highest judicial tribunal of the states passes upon questions of law, originating or arising in courts of an inferior jurisdiction, and has no jury in attendance as a part of its organization. In other states, the highest court passes upon questions of law, and also through the aid of a jury ascertains and passes upon the facts. All crimes and offences against the sovereignty or laws of a state, are passed upon and punished by the state judiciary. The judicial officers of the several states, especially the judges of the higher courts, have generally heretofore held their offices during good behavior, and by appointment of the executive.\* The legislative and executive departments have a right to call upon the judiciary for its opinion upon important questions of public concernment, and which do not relate to the pri-

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\* In the opinion of the writer no other tenure of office, or mode of appointment, is judicious or safe.

vate interests of individuals litigating before the judicial tribunals.\* In the several states the trial by jury constitutes a part of the judicial department, and the parties who have recourse to this department of the government for the ascertainment and assertion of their rights, generally, are entitled to the interposition of a jury, which, under instructions from the court, determine the question or questions of fact, which may be in contestation between the parties.† The mode of selecting a jury is prescribed by law. The selection is accomplished through the instrumentality of public officers, under regulations designed to secure impartiality in the choice. In criminal and in civil causes, those whose rights are to be passed upon, may, upon showing legal cause of objection, have one or more of the jury set aside. In some criminal causes the party accused may set aside a prescribed number of the jury, without assigning any reason or cause of objection. This immunity is conceded upon the ground that every party has a right to a fair and impartial trial, and to some extent, as a matter of humanity, is allowed to select his peers, by whom his acts are to be passed upon.

The courts of a state are courts of general jurisdiction, and the presumption and intendment, in all cases before them, is in favor of their jurisdiction; and this intendment prevails until the contrary or a want of jurisdiction

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\* This is inexpedient; the government should rely for counsel upon all legal questions upon its attorney-general, or other law officer.

† Many politicians and some practitioners at the bar, have contended that the jury in criminal cases, are and should be judges of the law so well as of the fact. This is not so, and never can be, with safety to the community. A learned, educated individual, whose life has been devoted from early youth to mature manhood, to the acquisition of legal knowledge, is more competent to unfold the science of law than any man not so educated can be.

is shown. The courts of the United States are courts of limited, although not inferior jurisdiction, and their jurisdiction must be shown, must appear of record. The state judiciary has the exclusive power of determination as to the import and effect of its constitution, as has already been stated, and must say whether a state statute is or is not in conformity with the state constitution; and no other department or tribunal can so say, or rightfully pass upon the question.

I have presented a general outline of the judicial departments of the federal and of the state sovereignty. It has not been my purpose to discuss any particular branch of jurisprudence, or to exhibit in detail the entire machinery of the departments considered. My intent is, to present for your consideration certain prominent results or deductions, which may be made from an analysis of the departments to which reference has been made. One prominent feature consists in a distribution of jurisdiction. The courts of the United States and of the several states, are classified; each having its particular class of cases, or department of jurisdiction. Each sovereignty, the federal and the state, having one court, exercising a general supervision and control over all other courts of the same sovereignty. Another feature consists in a division of power, which is two-fold, one derived from a division of government, from the establishment of two sovereignties; the other from the creation and division of departments. This division of department is seen in the judiciary, by the establishment of judges to determine the law, of a jury to determine the fact. The judicial department, as I have endeavored to present it, shows the same theory, the same system, the same science of government, which are shown in the legislative department. This theory, this system, this science, consists in

the establishment of internal political and social institutions ; of a distribution and division of power ; in the coöperation of the people in the management of these institutions, and in the execution of the trusts confided to government.





## LECTURE IX.

REVENUE.—TARIFF.—FREE TRADE.—PUBLIC LANDS —TERRITORIAL GOVERNMENTS.—  
• THE ADMISSION OF NEW STATES.—THE INDIAN TRIBES.

THE system of government which exists in the United States, is invested with every supposed essential capacity. A most important power is found in the right of imposing taxes or duties for its support, and for the execution of all the powers with which it is intrusted. The power of taxation is difficult, and often dangerous, to the government by which it is applied. The powers of government when exercised imperceptibly, or upon matters which do not operate upon the avocations of the citizen, so as to impede his pursuits or plans, are not the subject of general discussion. Men are accustomed to contribute indirectly, from their private resources, to many purposes designed to promote the improvement of society and of individuals, sums of money which they would not expend for the same purpose directly. Taking advantage of this peculiarity of the human mind, fairs and similar schemes, in themselves of no value, are resorted to as the means of obtaining money for purposes which are worthy and important. Government and political associations are accustomed to avail of this peculiarity, so far as possible, in the selection of means, by which to obtain an adequate revenue. They resort, as a consequence, to indirect tax-

ation, whenever such method can be made successful. In this respect, the federal government has ample power, by recourse to direct and indirect taxation.

The constitution of the United States provides, that "the congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States." This clause confers ample power for the accomplishment of the limited and legitimate duties of the federal sovereignty. It has, however, been the subject and the occasion of different and opposing political opinions. On one side, the words which authorize congress to provide for the common welfare of the United States, have been relied upon as conferring an almost unlimited power. Under a supposed protection derived from these words, considered without reference to the connection in which they are found, schemes of enlarged internal improvement have been invented, and, in some instances, have succeeded. Some of those who have advocated such schemes, seem to have forgotten for the moment, that the federal sovereignty is one of limited powers, designed and conferred for certain defined purposes. They have also disregarded the well settled principles of construction, which must be applied to an express grant for a specific purpose. In such case, ordinarily, general words which may be found are not designed to enlarge the grant, or extend it to any purpose not immediately connected with, and essential to, its subject. Other politicians, looking at the system, rightfully in this respect, as one of limited jurisdiction, have insisted upon a close, strict construction, forgetting the purpose of the system, and disregarding the rules of construction applicable to every written document. Both of these views are unsound and inconsistent with the true theory. The

clause to which reference has been made, so far as judicial authority and the opinion of constitutional lawyers are to be relied upon, is a grant of the power of taxation, adequate to the express grants and duties conferred and imposed upon the federal sovereignty ; and the general words used are designed to prevent a close, technical, rigid construction of the words used, uninfluenced by the purpose. The federal sovereignty has, on several occasions, resorted to direct taxation ; this has been in consequence of extraordinary demands upon the government, growing out of war. The people have submitted, not however with much grace, inasmuch as such taxation has always produced in the public mind disquiet, uneasiness, and complaint against the government. With few exceptions, the federal government has been maintained by indirect taxation, by the imposition of duties upon property imported from foreign countries. In this way, every individual who uses an article of foreign growth or manufacture, pays ordinarily from twenty to fifty per cent. of the cost of the article, for the support of government, and in some instances a much greater per cent. These payments are readily made, because the purchaser of an article rarely enters into a computation of the elements or details which constitute the price of an article, which he may require, or may choose to buy.

The state sovereignty is also clothed with the power of taxation. It is, however, a limited power, which cannot rightfully be exercised, except so far as the purpose and duty of the government, fairly and reasonably ascertained from an examination of its constitution, may require. The finances of the state government are derived from an imposition of taxes upon persons, property, income, and occupation. They are direct. In this respect, a difference exists practically in the two sovereignties. The influence of this difference is very great upon the

permanence of the union. If the entire sum devoted to the use and purpose of government by the national and state sovereignties, should for five or ten years be raised by a direct tax upon the people and their property, complaint would become common and general, which might produce much evil; it most certainly would produce a practical economy of expenditure, which exists now only in theory. By indirect taxation, the citizen determines to some extent how much he will pay, and is not subject to the annoyance and importunity of a tax collector. The new states submit to this mode of taxation, although they might feel oppressed and unwilling to contribute their quota of the expenditure of the national government, if called upon directly for the money. This diversity in the mode of taxation is of the utmost importance to the quiet of the community, and to the successful working of our system. The power of taxation is submitted to with additional cheerfulness, derived from the fact that those who pay, through the instrumentality of their representatives and agents, determine the amount to be paid, and the purpose of the payment. The want of a voice or agency in the imposition of a tax, induced the destruction of some tea in the Boston harbor, and contributed much and mainly to the revolution which dissolved our dependence upon Great Britain, and gave to this continent the states and principles which now command the respect and admiration of the world. The subject of revenue has been the source of more vehement opposing party political discussion, than almost any other matter connected with the government. The propriety of free trade, the principles upon which a tariff or regulation of duties should be established, have been discussed with ability, occasionally without party prejudice, but more frequently for mere party. These discussions as a whole have had a beneficial influence upon the



character of our system ; they have also had an extensive influence upon the business and occupation of the citizens. I shall refer to them briefly, not as elements of party difference, but as they concern and constitute a part of our system of political economy. Free trade is not to be received or rejected upon any absolute, arbitrary, fixed principle, but its adoption or rejection is to be determined by various considerations. As a natural privilege, an individual has a right to buy and to sell, at such time and place as may suit himself. He who advocates free trade, starts, therefore, with this principle in his favor ; but it is to be remembered, that natural right is not necessarily and uniformly the law of society. An individual, by going to a distance from his residence, or to a neighboring city or town, may be able to purchase an article cheaper or better, or which may be supposed to be better or cheaper than he can obtain of his neighbors, with whom he is in daily intercourse of business, and who are accustomed to buy of, or traffic with him ; under these circumstances he is disposed to help those, upon whom he is somewhat dependent for his own support or comfort ; under such circumstances he buys at home, and voluntarily relinquishes his natural right of free trade. In other words, all rights, natural and artificial, are modified by surrounding rights and circumstances. It cannot, therefore, be said in relation to a nation, that it must adopt or reject free trade with any other nation, or with all nations, as a matter of course, or because such adoption or rejection may be supposed to be in accordance with certain fixed, well established principles of political economy or science. The question must be determined by every nation for itself, upon a consideration of its relation to other countries, upon a consideration of the interests of its citizens, as a whole, as members of a social community, having the same general purpose.

The regulation of duties, the tariff, has been a fruitful theme of discussion, has been used as an instrument by which to obtain political capital. Discussions upon this subject are useful, even when conducted by mere politicians, inasmuch as the public mind must be enlightened and the public judgment improved, by an examination of our system, or of the policy pursued for the time being by those in office. Erroneous and even partizan doctrines do not, in this country, so far as they relate to government, accomplish any permanent or extraordinary result. I speak with reference to our past history. Error, upon political subjects, when open and exposed to be combatted and resisted by reason, is corrected. The American people, to a certain extent, are educated by the means of books, schools, newspapers, and public discussions. In addition to this, they possess a practical knowledge of men and things, and of political economy, derived from their power over and participation in our system of government, and over those who execute its trusts. They are, therefore, ordinarily competent to detect error; they are ever ready to uphold the truth when discovered.

I cannot enter upon an extended discussion of the principles by which the imposition of duties should be regulated. There are certain prominent principles, which may be regarded as the result of political science or economy. Our government is limited, its power of taxation is limited. As a consequence of these limitations, the first and paramount consideration in the imposition of duties is, an ascertainment of the sum which can rightfully be assessed, and which is required for a manly, economical, and judicious execution of the trusts of government. This cannot be fixed with mathematical certainty, but it can be approximated; and when approximated it is not to be enlarged or diminished to correspond with political considerations of a party character, or to carry out any

favorite system of political economy which may be adopted by this or that individual or class. Another element to be regarded is, an estimate of the amount and value of property, and of the different kinds of property which may be imported. Having fixed the amount to be assessed, and the value and character of the property upon which it is to be assessed, the mode of distribution of assessment is to be determined. This determination cannot be had with propriety, by the adoption of an arbitrary standard to be applied under all circumstances, at all times; but must be attained, so as to give force and effect to several considerations.

The theory of our system is, that the people are to be let alone, so far as they may be consistently with public right. They are not unnecessarily to be impeded in business operations, in their employment. As an incident of the concession so made in favor of private right, it is the duty of the public, of the government, to avoid all sudden changes of policy, by which the business of the community may be disarranged. In the regulation and imposition of duties, in the assessment of taxes, it is not only a matter of science but of solemn duty, imposed upon the government, to impose them, so as to avoid a necessity, on the part of the citizen, suddenly to abandon or change his course of business.

Another element of great import, consists in the duty of government, so far as it legitimately can, to guard its own interests and the interests of its citizens, by its legislation, against the adverse effects and influence of the legislation of other countries with which it has commercial relations.

If Great Britain, or any other country with which the United States have intercourse, shall, by its course of legislation, attempt to impede or control the policy or welfare of the United States, or of its citizens, the federal

government, as a matter of self-protection and defence, should, by its legislation, so far as its limited jurisdiction will permit, counteract and resist the influence and effect of such foreign legislation, otherwise foreign inroads might quietly and imperceptibly be made upon our interests and institutions. Another principle, applicable to the imposition of duties, is derived from the character of the property upon which they are to be imposed. Articles of daily use and consumption, which from such use may be regarded as essential to the comfort of a large portion of the people, usually are and should be assessed at a lower rate than is imposed upon articles of fancy or luxury, the use of which may easily be dispensed. It is also fit and proper to provide, incidentally, and so far as may be prudent, doing no injury to other interests, for the production and growth of the essential articles of consumption, within our own territory, so as to avoid, in time of war or other contingency, a dependence upon other nations. These are principles not dependent upon party considerations or policy, and should not be disregarded by those whose trusts are not of a party character; by those who are required to administer the trusts of government for the benefit and protection of the entire country and its institutions.

The federal government has in its charge the possession and control of an extensive territory, commonly referred to as the public lands. In relation to these, the government exercises the rights which appertain to it, as owner of the soil, and also the rights of sovereignty, political rights. As a general principle, the government should not be the owner of soil, except so far as its municipal and public duties may require such ownership. In other words, I mean to say, that the government cannot rightfully become the purchaser and owner of land, merely for private purposes, or for speculation. The



history of the public domain is instructive, and is worthy of a more extended examination than is fit or needful for me to make. When the colonies were established in this country, the British crown made grants of the soil to the colonies, and to individuals. Virginia originally claimed a large extent of territory under a grant made in 1609, the boundaries of which were assumed without any accurate or definite knowledge, which was possessed by the grantor or grantee, as to the extent of the grant. In 1632, a grant was made to Lord Baltimore of an extensive territory, embracing within its limits, to some extent, the same land which had previously been the subject of grant. A grant was made on 7th of October, 1691, in the third year of William and Mary, under which Massachusetts claimed rights. After the adoption of the federal constitution, the country was embarrassed by its indebtment, and the several states were encumbered with liabilities.

It was essential to the peace and prosperity of the country, it was due to its integrity and to the faith which had been reposed, that some means should be adopted to improve the condition of the community, to discharge the public assurances. The waste lands which had been the property of the crown, to some of which the states severally asserted title, as owners, were naturally regarded as a source or fund from which to obtain the means of paying and of performing the obligations which had been assumed. The application of the lands to this purpose was regarded as an appropriate use and disposition, notwithstanding the title and ownership of the several states was not of equal value. This inequality of interest was not considered as an obstacle, or as affording cause of serious objection. The people had one purpose and one view, which was patriotic, and regarded only the welfare of the country as a whole. Taking advantage of the



opinion and disposition which prevailed, congress, in September, 1780, recommended to the several states in the union having claims to western territory, to make cessions of a portion thereof to the United States. In October of the same year, congress resolved that any lands so ceded, in pursuance of their previous recommendation, should be disposed of for the common benefit of the United States; should be settled and formed into distinct republican states, and that the land should be settled and granted under regulations which congress might adopt. In 1783, congress adopted another resolution, setting forth the conditions on which cessions of territory should be received. Immediately after this resolution, Virginia made a cession, referring to the resolution of congress passed in September, 1780, whereby the title of Virginia to the north-west territory, was transferred to the United States, upon an express condition that the lands so ceded should be considered as a common fund, for the use and benefit of such of the several states as had or should become members of the union, and should be in good faith applied to such purpose, and for no other use. Massachusetts, Connecticut, and New York have made similar grants, and upon similar trusts and conditions. The United States hold the land as owner and as sovereign, for purposes of revenue, and for the purpose of enlarging our political institutions. All of the grants of the several states were made upon three conditions: First, that the ceded territories should be formed into states, and admitted in due time into the union, with all the rights belonging to other states; Secondly, that the lands should constitute a common fund, to be disposed of for the general benefit of all the states; Thirdly, that they should be sold, and settled, at such time as congress should direct. The federal government, acting in good faith, cannot disregard the trusts to which it has assented, by an accept-

ance of the grants by which it acquired its title as owner, to the public lands. Such acceptance does not bind or qualify the right of the federal government over the territory, in relation to matters of sovereignty. The provision, that the territory should in due time be formed into states, and admitted as such into the union, with the same privileges as other states enjoy, leaves the discretion of congress, in this particular, to be exercised in accordance with its own judgment. The public lands were not exclusively obtained under the several state grants, to which reference has been made. In addition to the grants made by the several states, cessions have been made by foreign sovereignties. Louisiana was purchased of France, or taken in discharge of supposed claims against that country. Florida was obtained from Spain. Some portion of the Oregon territory was procured from Spain. In relation to other portions of this territory, it may, perhaps, be said, that the United States hold it by discovery and occupation. The United States have also acquired large bodies of land, by cession or purchase from the Indians. Many of the most important subjects, which appertain to the duties of the federal government, have been the occasion of vehement party discussion; they have given opportunity for the invention of many schemes and theories, sound and unsound. This may be said in relation to the public lands; the course of the government, in its disposition of them, has been frequently disapproved and condemned, from time to time. Some few years since, it was urged in the senate of the United States, that the management of the public lands by the government had been harsh, illiberal, and severe; that the citizens, who had embarked their fortunes in the great west, with a determination to unfold its capacity and to advance it to a state of civilization, should be encouraged and sustained by donations of the soil. This proposition

was calculated to commend itself, as a liberal and humane arrangement. It was, however, resisted; and upon a resolution introduced in the senate of the United States, by which an inquiry was proposed in relation to the mode of selling the public lands, and to ascertain the expediency of more rapid sales, a debate arose in which extraordinary and able efforts were made by several senators. The resolution gave rise also to a discussion not immediately connected with its subject, which produced an examination and consideration of some portion of our system, of the duties and powers of government, in relation to which a senator from Massachusetts,\* made a most profound, constitutional exposition. The public lands, as property, as a source of revenue, are of much value. This value, however, is of trifling importance when contrasted with the political associations and institutions, which have resulted, which may continue to result, from the ownership and possession of them. After a sale and settlement of a section of territory has been made, the occupants of the soil, although under the protection of the United States, have no local legislation or tribunals, by which to protect their individual rights as members of society. This condition of things, in which every man virtually makes and construes his own law, cannot with safety be sustained or permitted. To avoid the evils of such position, congress, under the constitution of the United States, establishes a territorial government, provides for the existence of legislative, judicial, and executive departments, generally appointing the officers of the judicial and executive departments, through the action of the President of the United States, reserving a control over the acts of the legislative department, which is composed of members chosen by and from the terri-

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\* The Hon. Daniel Webster.

tory. In this respect, congress exercises its own discretion, and confers more or less power upon all the local officers and departments, according to the peculiar circumstances connected with the territory to be governed. The power of congress is limited and controlled only by the constitution of the United States, which it cannot disregard. Any and every power or authority conferred upon a territorial government, must be in subjection to the constitution ; and any attempt to transcend this instrument would fail in its accomplishment.

The constitution of the United States is coextensive with the sovereignty of the United States ; and any and every territory which rightfully belongs to the one cannot be above or beyond the control of the other, although, in some instances, from a want of local law, of departments and institutions, it may not be applied. Whenever territory has been obtained by cession from France, or other foreign country, the laws of the country by which the cession may have been made, are regarded as the measure of right, or as the laws of the territory, until the United States impose other rules and regulations. This is, however, limited by the constitution and nature of our civil institutions, against which no foreign law can prevail by adoption or permission. The cession of the soil and sovereignty of a country or province, does not operate as a cession, or as an extinguishment of individual private right. Persons occupying a ceded territory may continue and become subjects of the sovereignty to which it may have been ceded ; or they may dispose of their effects, and become residents of other portions of the country of their original allegiance, or of any other which may suit them. This is regarded as a matter of public law, of public right, without any stipulation, although in the cession of territory by one sovereignty to another, it is usual to make provision for the



security of individuals, and of private right. In the treaty by which Louisiana was transferred to the United States, it is provided, that "the inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted, so soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and, in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." This short clause contains three important stipulations on the part of the United States. That the territory should be admitted to the union as a state, so soon as it could be in conformity with the constitution; that the inhabitants should thereby become citizens of the United States, and in the meantime should be protected in their liberty, property, and religion. All these stipulations are qualified and restricted by the constitution, and their performance could be required only so far as the forms of our government permit a performance thereof. Similar provisos have been in other cessions of territory. In October, 1803, congress passed an act, authorizing the president to take possession of the territory which had been ceded by France. Subsequently the same was divided into two districts, and territorial governments were established; the southern portion under the name of Orleans, and the other under the title of district of Louisiana. In April, 1812, the southern district was admitted to the union as a state, under the name of Louisiana and the name of the other district was changed to that of Missouri, and subsequently, on the 10th of August, 1821, became a state under the name of Missouri. The admission of this state caused a disagreement, at the time, between the two branches of congress. It also produced an excited and



somewhat turbulent debate, growing out of an effort to prohibit slavery. Henry Clay exerted an important and conciliatory influence, which was productive of much good, which did much to allay angry feeling, to carry the union through a boisterous passage. The territories of the United States are ordinarily allowed to send delegates to the house of representatives, a branch of congress, who are allowed to talk and discuss measures, but are not allowed to vote for the adoption or rejection thereof. This last right cannot be conferred constitutionally, except upon a representative or senator of some state. The delegate of a territory, however, can advise in relation to the condition and character of the territory which he represents, and thereby furnish to those who make law for his constituents' local information, which might not otherwise be so readily or accurately obtained. The principal officers, judicial and executive, of a territory, are frequently selected from without the territory in which their duties are to be performed. This is often a cause of disquiet and uneasiness, inasmuch as the people are inclined to think, that all the offices and emoluments of place belong to themselves; that they are, in fact, more conversant with and more competent to manage their own affairs than strangers can be. This is undoubtedly true; the feeling exhibits the influence of our system, in favor of free institutions, in favor of an extension of political rights to all, and it exhibits in the people an impatience, an unwillingness in any condition in which they are not so free as their neighbors; it also shows a willingness to extend to others the freedom which is vouchsafed by our system.

The result is, that so soon as a territorial government is established, the people look forward to an improvement in their political condition, which can be attained only by the establishment of a state government. This condi-

tion, when attained, is the last, and it may with propriety be said, the most important, in which the public lands are considered. They are now to be regarded in their political aspect. Under the constitution of the United States, new states may be admitted by the congress into the union; but no new state can be formed or erected within the jurisdiction of any other state, nor can any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress. Whether the framers of the constitution contemplated the acquisition of new territory, may be doubted. Whether congress can acquire new territory merely for the purpose of creating new states, is an entirely different question; it can, without doubt, control any territory which appertains to the United States. I am unable to find any provision in the constitution, from which congress can assert in itself a right to purchase territory at its pleasure, at the cost of the nation, for the purpose of enlarging its domain or increasing the number of its states. As I have attempted to show, in a previous lecture, the acquisition of territory should be a matter of necessity, growing out of circumstances, under the control of the war or treaty-making power of the government.

In relation to the powers of the government, the people are inclined to enlarge or diminish them, in accordance with their wishes, momentarily forgetting or disregarding the fact, that the federal government is limited in its powers and in its purpose. Whenever an act of government is in harmony with the opinion or wish of a large majority of the people, no one can successfully gainsay or resist it, provided such act is of a sovereign political character. An act of the government, in fraud or in violation of private right, of contract, or which goes to the destruction of private property without compensation,

can be by the aid of the judiciary, successfully resisted. If the legislative or treaty-making power shall, in violation or in disregard of our system, acquire additional and foreign territory, it would probably be beyond the power of the judiciary to control or resist such acquisition. Although the judiciary is designed to uphold the constitution, to prevent its infraction, to restrain other departments and officers within constitutional limits, there are some matters of a political bearing and character which it cannot reach. If the legislative and executive departments admit that the state of the country in its relation to any other country, is a state of war, the judicial department must conform to such recognition of the status of the country, and regard it as a state of war.

Upon the same or a similar principle, it may be urged with great plausibility, that whenever the legislative and executive departments recognize certain territory as the territory of the United States, the judiciary is bound to regard it as territory of the United States. The acquisition of territory must depend, therefore, practically, upon the fidelity and integrity of the legislative and executive departments. These departments have the same interest to uphold and adhere to the system, as the people or any other department of government can have. Congress is bound to maintain in every state a republican form of government; this obligation applies to new states, so well as to old, and whenever a state is admitted, whatever its constitution may be, whatever laws it may pass, each and all of these, when they become the subject of discussion in the judicial tribunals, must conform to the constitution of the United States, and if they do not so conform, they will be regarded as null and void. From this short survey of the public lands, you may perceive their value as a matter of money, as property held by the United States in trust, for certain specified purposes,

which they are bound to execute, and which they may not rightfully disregard. Lands have been given to soldiers, and to their families, for services rendered or to be rendered ; they have been the subject of donation ; and, under some emergencies it may be and undoubtedly would be judicious, and within the rightful exercise of power, to give away portions of them ; but an indiscriminate donation of them, as matter of mere charity or grace, or to build up any one state at the expense of another, would be a violation of the trusts under which they are holden.

The survey which has been presented also shows their political value and history. It shows you how states are made, and that the policy of the government has been liberal. A new country, when first settled, generally has as pioneers a hardy, industrious, and adventurous race of men, of different origin, of different habits, each class having its own peculiarities. The territorial government, which is the first in the order of progress, is designed to encourage and stimulate their exertions. They are aided in their public enterprises, and in the support of government, from the exchequer of the country. In process of time, they advance in civilization, in the arts and sciences, in education, and in a knowledge of free institutions, in habits and purpose. In this respect they differ from colonies, because they are in a state of pupilage, and look forward to the time at which they may emerge. Whereas colonies once are colonies forever, unless they rise against the parent government, and by reason of actual or supposed wrongs and grievances, assert their independence, and assume their inalienable right to have a voice and an influence in their own government. The continuance of a territorial pupilage is dependent upon many considerations. In the case of a portion of the territory acquired from France, that which is now Missouri, some



eighteen years elapsed before its admission as a state. The title to the public lands holden by the United States, has in part been obtained by purchase of the Indian tribes. They occupy a relation to the United States, which has its own peculiarities. This relation has been examined as a moral question, and many persons have regarded them as the subjects of wrong and oppression. The theory of all civilized nations in relation to them has been, that civilization and the elevation of mind and morals, which may result therefrom, is the great object and purpose of human existence; that the progress of civilization is and must be onward, although its progress may be marked by those who may fall by the wayside, or by the memorials and remembrances of a race extinct. In pursuance of this theory, the natives of a before unknown country, when discovered by civilized nations, recede, and continue to recede until the places which once knew them shall know them no more. The policy of the United States, which has been adopted in their intercourse with the Indian tribes, has been liberal and humane. They are regarded as the owners and occupants of the soil over which their hunting grounds may extend, and in its occupation they have been and are protected. They are allowed to govern themselves, in their internal and domestic affairs, without check or restraint. They have been furnished with implements of husbandry, and many efforts have been made in their favor, designed to elevate and improve their moral and intellectual condition. They are not, however, allowed the rights which appertain to the ownership of the soil. They cannot sell their land without the consent and approbation of the United States; and although they are permitted to establish and to execute their own internal rules and usages, they are under the protection and sovereignty of the United States.



The United States have been accustomed to make treaties with the different Indian tribes, in which they stipulate as sovereign contracting parties. These treaties have been made, generally, with intent to secure to them the privileges which they are permitted to enjoy, to protect their rights, and to afford inducements and opportunity for their improvement, with the intent also to induce a disposition, on the part of the tribes, of gratitude and dependence. The government of the United States has adhered with fidelity and exactness to its treaty stipulations. The Indians have been protected from encroachments by the adjoining states, and the citizens of the United States have been restrained from improper or wrongful interference with the pursuits or occupation of the Indians. In 1802, an act was passed by the congress of the United States to regulate trade and intercourse with the Indian tribes, and preserve peace on the frontiers. By this act it is provided, that no one should enter the Indian territory without a passport. Offences against the Indians and their territory are punishable under the laws of the United States; no settlement or survey, in territory secured by treaty to an Indian tribe, can be made by citizens of the United States, or by other persons not belonging to the tribe. The murder of an Indian by a citizen of the United States, or by other person not belonging to an Indian tribe, is punishable by death. Traders are not permitted to enter their territory, except under a license from the United States, which may be recalled by its government. The statute also provides that no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution. The act also provides,

that in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons from time to time, as temporary agents, to reside among the Indians, as he shall think fit. Prior to the passage of this act, and so early as May, 1800, provision was made by law for defraying the expense of travel to and from the seat of government, of such Indians as might visit the same, from the public treasury. In 1819, an act was passed, making provision for the civilization of the Indian tribes adjoining the frontier settlements, by which the President of the United States was authorized to employ capable persons to instruct Indians in agriculture, and to teach Indian children in reading, writing, and arithmetic. Similar provisions, designed to improve the character and condition of the Indian race, have been since made. Prior to the revolution, the lands in the United States were claimed by different foreign sovereignties, or by grants under them upon an alleged right of discovery. Discovery, as generally understood, gives an exclusive right to the discoverer to extinguish the Indian title by purchase, or by conquest, and gives also such right of sovereignty as the condition of the people may permit the discoverer to exercise. These rights by cessions to individuals, to colonies, and to the United States, have been transferred from the sovereignties which asserted title thereto, in the first instance, and are now owned by their grantees, or those claiming under them. The United States have not asserted its title originating in discovery, so far as to acquire the absolute possession, by the forcible expulsion of the Indian tribes. They have purchased as their convenience has required,

maintaining only in themselves an exclusive right to purchase. The title of the Indians to occupancy has been uniformly sustained and vindicated by the supreme court of the United States, in many cases before it, in which the Indian title has been discussed. The court has also maintained the political rights of the Indians, to the same extent as they have been recognized by the legislative and executive departments of the federal government. In a case designated, "*The Cherokee Nation v. The State of Georgia*," the court say, the Cherokee nation is not a foreign state, in the sense in which the term is used in the constitution of the United States. The Cherokees are a state; they have uniformly been so regarded. The treaties made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. The Indians are acknowledged to have an unquestionable right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the United States. They cannot appropriately be designated foreign nations, but they may be denominated domestic dependent nations. They occupy a territory to which the United States assert title, independent of their will, which must take effect in possession, when the Indian possession ceases. They look to the United States for protection, rely upon its kindness and its power, and appeal to its sovereignty, in all cases of want or difficulty.

In another case instituted by *Worcester v. The State of Georgia*, in the supreme court, to reverse a decision of the state court, the political rights of the Indians were acknowledged and vindicated against the improper and unconstitutional legislation of Georgia. In this case it

is said, that the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; that all intercourse with the Indians should be carried on under the exclusive government of the union; that they had always been recognized as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemorial. The case to which reference has been made, contains an able review of the origin and character of our political history, of the rights of discovery, of our title to the soil, and of our policy in relation to those whose fathers preceded our ancestors in its possession. The chief justice closed an able opinion by saying, "The Cherokee nation is a distinct community, occupying its own territory with boundaries described, in which the laws of Georgia have no force, and which the citizens of Georgia have no right to enter, but with the consent of the Cherokees, or in conformity with treaties, or with the acts of congress." I have briefly exhibited to you the mode and objects in and from which the revenue of the state, and of the national sovereignty, is obtained. In so doing, I have referred to matters more or less directly connected therewith, from which you will perceive, that a division and limitation of power is manifest throughout. You will also perceive, that a disposition to encourage the establishment of political institutions, based upon the will of the people, is a prominent and pervading element.





## LECTURE X.

THE RELATION WHICH SUBSISTS BETWEEN THE FEDERAL GOVERNMENT AND THE SEVERAL STATES. — BETWEEN THE SEVERAL STATES AS INDEPENDENT SOVEREIGNTIES. — BETWEEN THE CITIZENS OF THE SEVERAL STATES.

THE colonies which existed in the United States under the protection and control of the British crown, by means of the American revolution, became independent as states, or political sovereignties. The people formed constitutions, by which the powers of government were defined, and thereby the relation between the people and the government was established. The people reserved certain rights to themselves, and retained control, to a certain extent, over the government, so as to secure a faithful administration of the trusts reposed. In all the state constitutions so adopted, evidence is contained, showing that the people did not consider themselves made for the use or benefit of those who might exercise the powers of government, that in their judgment, government should be established for the use and benefit of those governed. The state sovereignties, although vested with limited jurisdiction, were independent of all other sovereignties or governments; they were amenable only to the constitution under which, and to the people of the state for which they had been established. The several states, as originally constituted, exercised the powers of war and

peace, of making treaties, of regulating their intercourse, and the intercourse of their citizens, with other states and citizens.

At this period of our history, there were two, and only two, depositories of power, the people and the state government. Soon it was ascertained that the several states, independent of each other, with no common bond or contract of union, had many interests in common, for the attainment and security of which they had acted together against the parent government from which they had severed. It was ascertained that the foreign relations of the several states were similar in purpose; that the citizens of the several states, in their business operations, mingled with each other. To avoid collision and contention between themselves, to make common cause against external enemies and influence, an association of the states was proposed and carried into effect, in the form of articles of confederation and perpetual union, which was assented to by the thirteen original states. In this arrangement the several states acted in their sovereign capacity as states, in which the people, acting as individuals, had no direct agency. It was agreed, that the confederacy should be known as the United States of America; that each state should retain its sovereignty, freedom, and independence; and every power, jurisdiction, and right which had not been expressly delegated to the United States in congress assembled. Provision was made for a congress composed of delegates from the several states, the states reserving power to recall their delegates at any time, by the substitution of others. By these articles the states severally entered into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon

them or any of them on account of religion, sovereignty, trade, or any other pretence whatever. The general intent of mutual aid and protection is manifest in the articles adopted. A prominent and important purpose was sought to be attained by providing that no state, without the consent of the United States in congress assembled, should send or receive an embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; that no two or more states should enter into any treaty, confederacy, or alliance with each other, without the consent of congress. These articles contain evidence of much political knowledge and sagacity; they were, however, cumbersome, and, from many defects, were found insufficient and incompetent to accomplish the purpose for which they were designed. In this condition of the country, it became essential to its interests, and to the safety of the people, to devise some scheme by which to avoid the inconvenience, the insufficiency, and the evils of the articles of association. A convention of delegates from the several states was suggested, and the suggestion was adopted, for the purpose of proposing a remedy. This convention was composed of the most able and patriotic men in the country, who were chosen for their distinguished ability and patriotism. After days of deliberate, candid, and careful discussion and consideration, an instrument, designated the constitution of the United States, was recommended to the people of the United States, not to the people of a single state, for their adoption and ratification. It was not offered for the adoption and ratification of the several states in their sovereign capacity, in which capacity they had previously assented to the articles of confederation, but to the people of the entire country, acting upon their individual will and responsibility. The people, in fact, through this convention, and the instrument which the

convention had prepared and recommended, proposed to the several states, that they should surrender and voluntarily relinquish some portion of the power of the sovereignty with which they were clothed ; that the people, upon such surrender and relinquishment of power, would establish a second or another government, upon which the power and sovereignty relinquished should be conferred.

This additional government was designed to be a government of the entire people of the United States, whose sovereignty and authority should not be bounded by state lines, but should be commensurate with the territory which belonged to the several states. This was not a matter of force, but of voluntary action ; the several states were not obliged to submit to this diminution of their authority ; they were not obliged to yield to the creation of another and independent government, which should assume a portion of the jurisdiction which they had exercised. The state governments, however, were governments of the people ; and they yielded to their request, to their moral power, by permitting the proposed constitution to be submitted to them for their adoption and ratification. To carry this project into effect, the people, acting in conventions assembled in the different states, accepted the constitution proposed, and thereby the federal government came into existence as an independent sovereignty, to the extent of the powers conferred. Many of the provisions contained in the articles of confederation were substantially inserted in the constitution. The great difference consisted in the substitution of a government clothed with power to exercise its trusts, with machinery and departments of its own, adequate to their execution, in the place and instead of a treaty, compact, or alliance between different governments, dependent for their performance upon their individual will and good faith. Prior to the adoption of the

constitution, as has been already stated, the depositories of power were two, the people and the state sovereignty. By an adoption of the constitution, the number of these depositories of power was increased to three: the people, the state government, and the federal government. By the coöperation of these depositories of power, your rights are sustained, your wrongs are compensated, and the trusts of government are executed.

In attempting to show, that the government of the United States is a government of the people, and not of the several states, I have not forgotten that the several states in their sovereign capacity, under certain restrictions and limitations, choose the senators of the United States, and in so doing elect the members of one branch of one department of the federal government. This does not and cannot change or diminish the power or capacity of the federal government, which does not depend, in these particulars, upon the implements or means by which one part of its construction is furnished, but it depends upon the instrument which defines its powers. It depends, so to speak, upon its charter. Regarding the two governments, the state and the national, as they have been described in previous lectures, you will easily perceive and understand the simplicity and certainty with which their several and respective action is regulated. The federal government is charged and intrusted with the performance of certain prescribed trusts or duties, operating upon and for the entire people of the United States. But its power does not extend to the ordinary business operations of the community, which are of a local character; so that, if no other than the federal government existed, the people in these particulars of daily concernment, and which constitute the principal objects of civil society, would be left to themselves without government. To avoid this, the state government



intervenes, and regulates the matters not confided to the federal government. The result of the system, as it has been established, is, you live under two governments, each independent within its constitutional limit. of the action of the other, each acting upon you, and upon your interests, in certain different particulars, to accomplish different individual purposes, but with and for the same general intent, which is your protection and security, at home and abroad, in the enjoyment of all the rights which civil society and its institutions can furnish.

Whenever two governments are mentioned, or reference is made to several governments, as distinct, independent sovereignties, the mind ordinarily and naturally regards them as foreign to each other. This cannot be said of the federal and state governments, in the sense in which the term foreign is used in its application to governments. The federal and state sovereignties, are not hostile or adverse to each other; they cannot be hostile or adverse to each other, as foreign nations, each controlling a different territory and people, may be hostile or adverse to each other. They cannot and do not negotiate with each other by treaties or embassies. They cannot assume, in relation to each other, a state of war. Although these two sovereignties are distinct and independent of each other, they exercise jurisdiction over the same territory and over the same people. The citizens or subjects of an individual state, are also citizens or subjects of the federal government. The state and federal sovereignties are not superior the one to the other; in this respect, they enjoy the same relative equality which is conceded to different foreign nations. Notwithstanding the restrictions imposed upon state authority in some particulars, and although it has been said, and can be said with truth, that the laws of the United States are supreme, and those of a state which may conflict there-

with must yield, these restrictions and such declaration do not import superiority or inferiority. The restrictions are designed to mark and define the boundary which exists between the government or jurisdiction of a state, and the jurisdiction of the national sovereignty.

It may be said of a statute or law of a state, constitutionally made, that it is supreme ; that a statute of the United States, in opposition or in conflict with such constitutional state statute, would be regarded void and inoperative. If the legislative department of an individual state declare, that a deed shall not be effectual to pass title to land, situate within the jurisdiction of such state, unless executed in the presence of two witnesses, an act of congress saying that the title may be passed by an instrument executed in the presence of one witness, would be inoperative and void, because the acquisition of title to land within an individual state, is a matter of state regulation exclusively. The true position is, that the state and federal sovereignties, in relation to the different trusts severally confided, are alike supreme, and the law of each, in relation to its several trusts, is the supreme law of the land. The constitution of the United States, and the constitution of the commonwealth of Massachusetts, so far as they relate to the commonwealth and to its citizens, must be regarded as papers or charters, each exclusive of the other, relating to different parts of the same general system, by which the rights and duties of the citizens of Massachusetts are ascertained. These constitutions may be regarded as different parts, if I may so say, of one and the same instrument, when applied to citizens or residents of Massachusetts, each supreme within its limit, that is, in relation to the matters severally confided. The constitution of the United States and the constitution of Vermont, constitute the fundamental law of that state ; so of every other state, add to its constitution that of the

United States, and its government is defined. If you so consider these constitutions, you will discover a system of government composed of two independent political institutions or sovereignties, intrusted with distinct and different, but limited powers, and you will readily understand the relation which these two political institutions maintain, severally the one to the other. You will also find the existence of three depositories of power, the people, the state, the federal government. I have attempted to show, that the state and the union are independent of each other; that they are independent only so far as they are content each to perform its own duty. I have shown, that certain restrictions have been imposed upon state authority, some of which, those which exclude a state from the management of the foreign relations of the country, that which prohibits a state from any enlargement of its territory without the consent of congress, are of a political character; others relate to the maintenance and security of private right. These restrictions, to some extent, afford the means, from which may be deduced the relation or boundary of the two sovereignties. If either sovereignty at any time, as may be supposed, shall have encroached upon the other, the federal sovereignty has, and from necessity must have, the final and conclusive power of decision.

The relation which subsists between the several states, is different from that which they severally sustain to the union. Prior to the adoption of the federal constitution, they were independent of each other, bound by no external obligation or law, except the law of nations, as applied or applicable to different sovereignties in their intercourse with each other. The articles of confederation which were originally adopted, were mere matters of contract, of agreement, in the nature of treaty stipulations. The several states, independent of such agreement, were

foreign to each other. By the adoption of the federal constitution, the extent of state sovereignty was diminished, by a surrender to the people, and a transfer by the people to the union. The independence of the several states in relation to their reserved powers is perfect, notwithstanding the constitution of the United States, and they are now as formerly foreign to each other, divested of the power or authority of making political contracts between themselves or with other foreign nations. The surrender of sovereignty which was made, did not enlarge the sovereignty, or enure to the benefit of the several states, in their individual character or capacity; it enured to the federal jurisdiction. As a compensation for the surrender, and as protection, the federal sovereignty undertook and engaged to guarantee to every state in the union a republican form of government, and to protect every state from invasion or insurrection. If any state shall make an inroad upon another, or shall attempt to change or subvert its form of government, the federal sovereignty is bound to suppress such interference.\*

That the states are foreign to each other as political institutions or sovereignties, has been determined by the federal judiciary, in a case which arose upon a bill of exchange, drawn by a citizen of one state, upon a resi-

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\* The mode in which the federal jurisdiction is to uphold a republican form of government in the several states, has not been prescribed. Whenever it shall be the subject of discussion, for the purpose of its execution, difficulty and embarrassment will be the result. The question has not arisen, and probably may not arise. What constitutes a republican form of government, is not a matter susceptible of an exact and precise definition. If any state should ingraft upon or insert in its constitution a provision subversive of, and at variance with, a republican form of government, so far as it may operate upon individual personal rights, the judiciary of the United States, with the aid of legislation by the congress of the United States, might probably afford protection. The most decisive and effectual, perhaps the only effectual remedy, in any such contingency, must be found in the intelligence and integrity of the people.



dent or citizen of another state. In the discussion had upon this subject, the court say, for all national purposes embraced by the federal constitution, the several states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. Mr. Justice Story, in a treatise written by him upon this subject, says, "This doctrine is founded upon clear and determinate principles; for not only has each state a separate and distinct municipal jurisprudence, founded upon its customary or common law, or statutable enactments; but each state is absolutely sovereign in its political organization, government, and dominion, saving and excepting only so far as there is a limited supreme sovereignty conferred upon the national government by the constitution of the United States."

The laws of a state have no force or effect in any other state, except so far as the constitution of the United States may give effect to them. The process of a state in its force and effect, is limited to the state within and by which it may be issued. Each state, in fact, regulates its own domestic affairs, without any restraint imposed by the legislation or local habits or institutions of any other state. In all these particulars they act as foreign to each other, and are to be so regarded. In some instances, the states voluntarily enact statutes in language copied or borrowed from the language of a statute of another state. This has been done, in some instances, in relation to a class of contracts required to be in writing, and also in relation to wills, the descent of estates and mortgages of personal property. The several states are not only foreign to each other, but as a general proposition they are



severally independent of each other. As sovereignties or political institutions, they are absolutely independent of each other, under all circumstances. In other words, I mean to say, that no state by virtue of its sovereignty can impose any restraint, restriction, or obligation upon any other state. The independence of a state, however, is limited to, and confined by a qualified extent of jurisdiction, and to the same extent as it has surrendered its sovereignty, by permitting a transfer of certain powers to the union, inasmuch as by such transfer, it has voluntarily diminished the subjects upon which its power might otherwise have been exercised. By the constitution of the United States, certain effect is given to the acts and proceedings of every state, in every other. If this is disregarded by any state, or by its departments, the remedy or correction is by resort to the judiciary of the United States, and not by an attempt on the part of a state to correct by its own agency any supposed disregard of its rights by another state. The relation between the several states is in every instance regulated by law, and is to be preserved and maintained by the adoption of legal remedies or measures; it is not and cannot rightfully be, under any condition of things, a relation of force, or of hostility. The constitution of the United States provides, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." This provision has been carried into effect by the legislation of congress so far as its action was essential. As matter of public law, the acts, records, and judicial proceedings of a country have no force or effect in any other country, except such as may be conceded as matter of comity, and whenever relied upon in a foreign jurisdic-

tion, they must be proved, as any other fact or matter is the subject of proof. This article in the constitution was designed to produce harmony between the several states, and to avoid inconveniences which otherwise might result from the intimacy and business operations existing, and which would be carried on between the citizens of the different states. If the right of one individual against another, over both of whom the judiciary of a state shall acquire jurisdiction, shall be ascertained and determined by such judiciary, the right between the parties is conclusively adjudicated, and in the absence of fraud, will be upheld in every other state of the union. This proceeds upon the ground, that a judgment obtained in the court of a state is not to be regarded in the courts of the other states as a foreign judgment, or merely as evidence to sustain an action, but is to be regarded as conclusive upon the merits of the matter, upon the rights of the parties.

A judgment obtained in one state cannot be enforced in another state by process from the state court in which the judgment may be rendered, because the process of every state is limited in its operation, to and within its own territory. If parties litigate their rights, in the commonwealth of Massachusetts, in a court of the state, the determination, assuming that the court shall acquire jurisdiction of the parties and of the subject-matter, is conclusive, and will be so regarded in every other state; but when sought to be enforced, and made available in another state, the remedy must be in accordance with the law of the state in which it is sought to be enforced. This does not impair or lessen the dignity or sovereignty of either state; the right only of the parties is determined. The provision of the constitution to which reference has been made, is designed to prevent unreasonable inconvenience and difficulty to individuals, which must have

resulted if a different system prevailed in this respect. If parties litigate their rights in England, or any other foreign country, by judicial proceedings in any court, except in one which acts upon principles of international law, the adjudication of such foreign court would not be regarded in the courts of this country as conclusive upon the merits, but would be regarded simply as presumptive evidence of the right. Such is, undoubtedly, the law as expounded by the judicial tribunals of the several states. Many eminent legal writers have maintained a contrary theory, assuming that a right judicially ascertained by a competent court, should be regarded as conclusively settled in the absence of fraud, and should be so regarded everywhere. This view of the subject, if considered and determined upon logical principles, without reference to the decisions of courts, is undoubtedly the correct view.

The relation of the states to each other is modified and controlled, in a matter of great importance, by a provision in the constitution of the United States which was designed to promote the peace and harmony of the country. The article to which reference is made, says, "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." This provision, practically, has been carried into effect, although its import and effect has not been the subject of consideration or of adjudication in the courts of the United States. Every independent sovereignty, ordinarily, has the exclusive authority and power to determine for itself who shall and who shall not enter its territory, and to say how far those who may be permitted to enter, shall be allowed the immunities and privileges of the country. This right is essential to the safety of every community, and depends upon the same principle upon which it has been said, that the house of every individual is his castle. As matter of fact, every civilized government is accus-

tomed to permit the citizens of other countries to enter its territory. In some instances, and, generally, passports are required, not for the purpose of imposing troublesome and useless restraints, but to obtain some assurance that the individual may be admitted, without danger to the institutions, or to the repose of the country, whose comity he is allowed to enjoy. An individual, admitted within the territory of a country not his own, impliedly undertakes to demean himself so as not to endanger the sovereignty, whose comity and hospitality may be extended to him. An individual thus admitted, for the time being, is subject to the law of the country in which he is allowed a temporary sojourn, and if he violate such law, he is amenable to its penalties ; he is also responsible to individuals, so far as he may attempt to interfere with their rights. The government which thus admits a stranger, may at any time, with or without reason, require him to leave its territory ; but such government is bound, so long as he remains under license express or implied, to protect him from all improper violations of his property, or character, or person. The right of refusing or admitting ingress, must be regarded as appertaining to the sovereign power, without the possession of which a government must be regarded as imperfect. The several states, so far as the citizens thereof are concerned, except in relation to paupers and criminals, who may pass from one state to another, have no discretion or power in this respect. The citizens of any and of every state in the American union, have a right in every other state to the immunities and privileges thereof, if they elect to avail of them. A state, therefore, has imposed upon it an obligation to receive the citizens of the other states within its territory, which it cannot rightfully avoid or resist. The citizens of the several states may change their residence and citizenship from one state to another at plea-



sure, not as matter of grace or comity, but as of right. The clause of the constitution to which your attention has been requested, has been the basis of much discussion, has been used and relied upon as an authority for theories and assumptions which have no legal existence, which cannot be sustained. In one aspect, a provision which requires a government or jurisdiction to receive within its territory a certain class of individuals, may well be regarded as an unreasonable and unwarrantable interference with its independence. The effect of this is modified somewhat by the fact that the individuals of one state, thus admitted and received in another, are of similar habits and interests, and belong to the same country. A more important consideration connected with the subject, is deduced from the character, from the extent of the privileges and immunities extended. The citizen of one of the several states when he enters another state, under the provision by which the right is conferred, has the same immunities and privileges as are enjoyed by the citizens of the state into which he enters. Whenever citizens of the United States transfer their citizenship from one state to another, they do not transfer the rights which depend for their existence upon the law of the state from which they transfer themselves. The privileges and immunities, which they may have enjoyed in the state which they abandon, do not attend them; they do not take with them the law or the institutions, or the protection of the state from which they recede. By an abandonment of a state, its peculiar and local advantages are renounced, and cannot be resumed in another state. A citizen of South Carolina, under the shield of the constitution of the United States, may become a citizen of Massachusetts, and may enjoy the privileges and immunities which appertain to a citizen of Massachusetts; but he cannot in Massachusetts enjoy the privileges and immunities which



a citizen of South Carolina may have, by force of its law or local institutions. This fact is of the utmost importance, and should never be forgotten or disregarded. In a particular state, the legal rate of interest may be seven or ten per cent., in another it may be six per cent. If a citizen of a state where the legal rate of interest is ten per cent., shall, under the constitution of the United States, become a citizen of a state in which only six per cent. is allowed by law, he must be content in his new residence, to negotiate his money for six per cent., the rate within the state of which he has become a citizen, and under whose laws his contracts are upheld.\* The principle is sustained, and is susceptible of illustration, from a great variety of other propositions of similar import, which will readily occur to you, in relation to which the result is and must be the same, as it is in the instance which I have presented. It is difficult to perceive how any mind conversant with our institutions can dissent; it has, nevertheless, been the subject of error and mistake in opinions which have been put forth.

The new state of California has many inducements and attractions, some substantial and real, others fallacious. It has been said, and may be said, that the citizens of every the several states, have equal right to become citizens of California; this is true. A citizen of Georgia, or of any other state, has so much and the same right to go there as a citizen of Massachusetts can have; neither the one nor the other can carry with him the law of the state which he may leave.\* Every state regulates its

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\* If a contract is made, by which interest is payable in a state where ten or seven per cent. is the legal rate, which shall subsequently be enforced in a state in which the legal interest is only six per cent., the interest allowed by the law where the contract is made, will be allowed as an incident or part of the contract.

† *Himes v. Howes*, 13 Met. Rep. 80. "An indenture, by which the child of a

own internal affairs in accordance with its own judgment, and those who enjoy the immunities thereof, either by comity or right, cannot introduce or set up any foreign power or authority as the standard of right. In many of the several states, privileges and immunities are conferred or recognized by law, which are not and cannot be set up or exercised in other states. The diminution of sovereignty, to which reference has been made, is a matter of consent on the part of the several states; it is a result of the union. By the establishment of a national government, a portion of the prerogatives which naturally belong to a sovereign state, has been surrendered, for the purpose, among other things, of a more perfect bond of union between the citizens of the several states. The citizens of the United States, as citizens of the federal government, are one and indivisible. It is, therefore, fit and convenient that they be allowed to pass from one state to another, as their business, their interests, or as the accidents and incidents of life may require. If they avail of this privilege, and transfer themselves from one state to another, it is not for the purpose of transferring the law or the institutions of a state to another, but simply to transfer themselves. Notwithstanding the right which appertains to the citizens of every state, at their election, to become citizens of any other state, limitations upon

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town pauper, in Rhode Island, is bound by the overseers of the poor, conformably to the law of that state, as an apprentice to a citizen of this state, is not valid here, although the statute of Rhode Island authorized the overseers to bind the party to a citizen of Rhode Island or to a citizen of Massachusetts." The principle of this decision has been repeatedly recognized in the English courts. The overseers of the poor in Massachusetts are authorized to bind certain persons as apprentices, under a law similar to that of Rhode Island, except it contains no express provision, authorizing a binding out of the state, as does the Rhode Island statute. If the master of an apprentice, bound to him by the law of one state, voluntarily transfers himself and apprentice to another state, the apprentice is thereby released, although similar apprenticeship is permitted by the law of the state to which he may have been transferred.

this right undoubtedly do and may exist. A state may rightfully, as a matter of self-preservation, exclude criminals and paupers from its territory, whether they come from a foreign country or from a sister state. This is in accordance with an admitted universal principle, that every political right under our system is qualified, and cannot be arbitrarily set up, to the destruction of society or of political institutions. Another right of independent sovereignties, foreign to each other, is that of making treaties and political contracts with each other. The several states, although foreign to each other in many particulars, cannot be regarded in this respect as in the possession of such relation. They cannot enter into treaties with each other; they cannot, as sovereignties, make any contract between themselves of a sovereign or political character. All contracts and arrangements of this description, between the several states, and between them and foreign governments, are exclusively matters which appertain to the federal government. Another matter of sovereignty, is the power of regulating contracts between its citizens and those of other governments. In this particular the power of the several states, to some extent, is controlled. No state can pass a law, whereby the obligation of contract shall be impaired. No government, conducted upon correct principles, would attempt thus to interfere with or destroy private right. But the constitution of the United States has not trusted to the faith and fidelity of the state governments; upon this subject, it has guarded right by an express provision. This provision is not exclusively for the benefit of the citizens of a state, in their negotiations carried on with the citizens of another state, but it extends to all contracts without reference to the parties. It results, therefore, that a state cannot impair the obligation of contracts made by and between its own citizens, any more than it can of con-

tracts made by its citizens with citizens of other states, or with the citizens of foreign countries; the restriction applies to all contracts. Another essential element of sovereignty is connected with the right or obligation of tradition. Between foreign nations, independent of contract between them, a nation is not obliged to surrender any person or persons found within its jurisdiction. A nation cannot, by its agents or officers, enter the territory of another, forcibly and against its consent, in pursuit of its own subjects. This results from the fact, that the territory of every sovereignty is exclusively its own. The same principle is applicable to a supposed right of search, in time of peace, of vessels upon the high seas. The deck of every vessel is, in contemplation of law, the territory of the sovereignty under whose flag it sails. To avoid the inconvenience of this principle of public law, foreign nations, in modern times, have entered into negotiations, by which, under certain restrictions, they have agreed each to surrender to the other the citizens or subjects of such other. Notwithstanding the principle of public law to which reference has been made, a nation cannot rightfully entice the citizens or subjects of its neighbour, or seduce them from their allegiance; such interference by one government with the subjects of another, would be regarded as just cause of complaint and animadversion. With equal truth it must be said, that a government cannot rightfully permit its territory to be used by foreigners, or by its own citizens, as a retreat or citadel, from which to send forth marauders upon the peace and quiet, or institutions of another sovereignty. This right of tradition is not a matter of state arrangement, but appertains exclusively to the federal sovereignty. So far as it relates to the several states, in their relation with each other, the constitution of the United States has provided, that "a person, charged in any state with



treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." "No person, held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

This clause in its effect is exceedingly simple. It provides, that no person legally subject to the jurisdiction of a particular state, shall, by escaping therefrom, avoid or resist the obligations which such jurisdiction may have imposed upon him. The clause operates a diminution of the sovereignty, in this particular, of the several states in their relation and intercourse with each other. The limitations and restrictions upon state sovereignty, in their relation to and with each other, imposed by the constitution of the United States, are not designed, and do not operate, to create a dependence, or condition of inferiority of one state upon, or in comparison with another. They were intended to uphold individual right, to secure to the citizens of every state equal privileges and immunities throughout the several states. The citizens of this country in many particulars, and so far as they owe allegiance to the federal government, are regarded as one community, as subjects or citizens of one and the same government; and to the extent of such allegiance they are not, and cannot be made responsible to any other power or control. In other particulars, they are subject, and owe allegiance to, the state in which they reside. The propriety and advantage of this twofold allegiance is manifest every day and every hour, in all the business operations, and in all the social relations of the commu-



nity. The citizens of Massachusetts or of any other state, would be embarrassed in their traffic, would be deprived of many advantages which they now enjoy, if compelled to confine themselves or their business within and to the limits of the state, in which they are, except so far as the other states should voluntarily, and as matter of grace, concede to their wishes. If a citizen of a foreign country shall attempt to assert any right in the courts of a state, or of the United States, independent of treaty stipulation, he will do so, in consequence of a comity extended to him; and he must be content to receive such law as the court before which his rights shall be depending, shall be able or willing to administer. Not so when a citizen of one state litigates his rights in the courts of another state, or in a court of the United States. In such case the citizen pursues his remedy as matter of right, and he is entitled to the law of the state in which he litigates, and to the law of the United States, so far as they may respectively be applicable. He is entitled to the law of the two sovereignties under which he lives, so far as the one or the other may be applicable; in other words, he is entitled to the law of our system of government. The union must, therefore, be regarded as a matter of necessity; as a means, and the only secure means of self-preservation. If the union had not been established, if our system of two sovereignties had not been adopted, the several states could not, against themselves and against the world, have maintained their relative rank and position. A despotism, or absolute government, extending over the entire territory, unless the conclusions which may be deduced from the history of other systems be fallacious, must have been the result. This subject, when reference to the dangers incident to our system shall be made, may be resumed. The several states and their citizens have a relation, also, to the territories of the

United States, and to places within the several states which may have been ceded to the United States, for forts, arsenals, and other public purposes connected with the federal government. This relation is not the same as that which exists between the several states. The territories of the United States, as has been shown, are exclusively under the control of the federal government, and under such laws as congress may make or permit to be made therein. This power is limited only by the constitution; and congress can exercise its discretion, except so far as the constitution may restrain its exercise. This discretion may be, and in fact is, modified by public opinion. Congress cannot, by its legislation over a territory of the United States, disregard or violate the constitution; and by implication not to be resisted, it cannot establish any government except such as may, under the constitution of the United States, be regarded as republican. If a citizen of one of the several states shall change his residence to a territory of the United States, he does not take with him the law of the state from which he recedes. He takes, upon his arrival within the territory, the law which he finds in force; he must submit to the law of the territory. This law of the territory, however made, is the law of the United States, and not the law of any individual state, or of any number of states as sovereignties. In respect to places within a state, which may have been ceded to the United States, the law of the federal jurisdiction has exclusive force and effect, except so far as the state in its cession may have reserved its rights. In the cessions which have been made, the rights reserved generally consist in a permission to the state and to its officers, to serve its process in the place ceded, for the enforcement of obligations arising from transactions occurring without the place ceded. The object of such permission or reservation is, to prevent

the establishment and existence of places, by a resort to which, individuals might otherwise escape from their allegiance and responsibility to a state and to its laws.\*

Another description of territory is worthy a passing observation; the District of Columbia. Every government, however invisible and intangible it may be, must, for many purposes, have locality. Those who framed the constitution of the United States, supposed, that the national government, so far as it required locality, appropriately might and should be without the jurisdiction or limit of any and of every state government. It was also considered expedient, by those who selected the seat of government, that the place should be somewhat isolated, and free from the excitements which more or less frequently are produced in every large community. External sudden influence was to be avoided and resisted. This district is under the exclusive control of congress. Its laws and its courts are subject to the action of the federal government. The people of the district are allowed to have certain municipal corporations, to establish their laws, and generally to manage their private affairs, so far as they may, without interfering with the laws and purposes of the federal government.†

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\* The United States may have in its possession a tract or parcel of land for a fort, arsenal, or navy yard, over which it may exercise exclusive power, excluding all state officers and state process. It may have such land and exclusive control, save only the existence of a license or authority in a state to enter the same, by its process and officers, for a particular and prescribed purpose. This furnishes an analogy which will aid in a correct ascertainment, or perception of the symmetry with which two sovereignties may exist, at the same time, etc., for different purposes.

† The District of Columbia was taken in part from Virginia, in part from Maryland, under a stipulation that the then existing law of Virginia should be applied and continued as the standard of right, over the part taken from Virginia, the law of Maryland over that taken from it, until congress should change, and under a clear implied undertaking, that private property and right should be protected and preserved.

The people of the District of Columbia have no representative in congress, and cannot have; they have no participation in the choice of the officers of the federal government, and cannot have; they have no delegate, and in this respect they are not so favored as are the people of the territories; they have no absolute or controlling influence or voice over the laws, or the law-maker to which they are subject. The right of suffrage, except in reference to their municipal officers, has not been conceded to them, and beyond such limit the right cannot be conceded. The denial of these political rights extends only to the permanent residents within the district. The members of congress and the executive officers of the national government are citizens of the several states from which they are temporarily sent by their constituents, and they severally retain their rights of citizenship. Those who are deprived of these rights by a voluntary adoption of the district as a place of residence, are compensated by the supposed advantages of a residence near the government. I have endeavored to present to your minds the different relations growing out of and existing under our system. The details may, perhaps, be considered complex; the principle by which these details are regulated and made available to the purpose contemplated, cannot be so regarded. If I have succeeded in my effort, even partially, you will perceive, that the two sovereignties of which I have spoken, the state and the federal, considered separately, are imperfect; neither is adequate, as now constituted, by its own power to accomplish all the purposes for which government is essential. Each has its own appropriate trusts and duties defined in its charter or constitution; each is supreme and independent of the other as a general proposition.

A merchant or other individual may employ one per-

son to act as agent in the disposition of a house, he may employ another to manage a commercial operation. Upon the same principle, the people of the United States may employ, and they have employed, two agents or sovereignties, each intrusted with certain duties, by the separate and harmonious action of which all the trusts of government are performed, and the union, known as the United States, so long as its citizens are faithful to themselves, will have no political compeer.





## LECTURE XI.

REVOLUTION. — AMENDMENT. — INSTRUCTION. — NULLIFICATION. — SECESSION. —  
STATE RIGHTS.

IN political discussions, in discussions which appertain to the conduct and acts of government, it is common to refer to a supposed right of revolution, meaning thereby a right to resist; and, if essential to the views and purposes of those who set up such right, to subvert, to put down the constituted authorities. In relation to every government, the presumption, in the first instance, is in favor of its legality; the presumption is, that it originated in the consent, express or implied, of those subject to its jurisdiction, and that its conduct is in conformity with the law of its creation. The legal presumption, in the absence of proof to the contrary, in relation to the deportment of public and of private individuals, is, that they perform their duty. Fraud, wrong, and oppression are not to be assumed; those who aver their existence are bound to show it. It is reasonable to presume the existence of integrity, unless some fact can be adduced, having a reasonable tendency to show, in a particular transaction or matter, that it has no existence. The American colonies admitted and acted upon the correctness of this suggestion. The declaration of indepen-

dence, which was made by them, wherein they declared themselves absolved from the British crown, enumerated with precision and distinctness the wrongs and injuries which had been imposed upon them. It was assumed, that a decent respect to the opinions of mankind required an exhibition of the causes of discontent.

Whenever a government is established by the consent of the people, it is in the nature of a contract or obligation, voluntarily assumed between the government and those by whom it was established. In such case, good faith requires that the duties and trusts of the government, on the one side, should be performed, and an obedience on the other, to the obligation assumed, should be conceded. If this be not so, as a primary proposition, civil society cannot be progressive; its objects cannot be attained; but a general state of anarchy and confusion must exist. This theory assumes that government will perform its duty, will discharge its trusts. A slight survey of history will exhibit evidence sufficient to authorize the declaration, that governments have not always performed their obligations; it will also show, in many instances, that government has been the instrument of gross oppression and injustice; it has enslaved its own people, and sought to enslave others. The people have often submitted patiently to wrong and oppression, forgetful of their condition, heeding only the external power and dignity which appertained, as they supposed, to their country and its leaders. In such instances of oppression, you will ordinarily perceive, in the character of the people, a want of intelligence, of education, of moral power. No law, human or divine, can require a community to submit to continued wrong and degradation; to see, day after day, their earnings seized by government, and applied to sustain its ambition, to enlarge its power, regardless of the rights and immunities of the people. It must, therefore,

be conceded, that in some cases and under some circumstances, the right or power of revolution may be exercised ; it may become a solemn duty to exercise it. The supposed right has frequently been exercised, in some instances by the overthrow and dethronement of a particular individual or class of individuals, substituting another individual or class of individuals, without making any change in the form or system of government. In other cases, those in power have been displaced, and the system has been abolished and a different one substituted. A difficulty and embarrassment does and always must attend this right, which arises from the fact, that there is not a fixed standard or rule, by which the propriety of its exercise can be determined. It cannot with propriety be said, that a majority of a people may, as mere matter of caprice, without cause, overturn and subvert the government under which they live. Such theory must be regarded too broad, too extensive ; because, if correct, if sustained, it destroys all civil society, all organization. Such theory assumes that government is not essential ; that it may be put down at any moment, and the rights upheld thereby destroyed. The power of revolution is an extreme right, to be exercised only when the government, from corruption, imbecility, or other cause, shall fail to afford protection and security to private right, shall fail to accomplish the purpose of government, shall disregard its trusts, and after all reasonable efforts to obtain redress and correction shall be unavailing. Every slight abandonment or neglect of duty, cannot authorize a state of anarchy and confusion, or the overthrow and overturn of a community, and the destruction of its institutions. In such case, the wrong to be redressed, the injury to be compensated, will not authorize a remedy so dangerous, so severe. The evidence and experience derived from history is, that revolutions often end in the substitution

and creation of a power more to be dreaded than the one displaced. It is also equally apparent from the history of the past, that the rights of the people may, under some circumstances, be asserted successfully against the government by the moral power of the people. The English government, next to our own, is to a much greater extent influenced by and subject to the power of the people than any other, and their rights, to the extent which they have been conferred, are so secure as are our rights. The English government has been modified and changed, from time to time, in many of its features, and its administration has been more or less in conformity with public sentiment, and this must continue in its future progress. These changes have been produced by the moral power of the people. Declarations or charters of right have frequently been made and conceded, by which the power and influence of the people have been enlarged, and their rights rendered more secure from the power of the government. Governments of an absolute and despotic character have, in some instances, yielded to the moral power of the people. Instances of concession by government to its subjects are numerous. The lesson which they teach is of the utmost value. These concessions have been the result, the effect of an adequate cause. Whenever and wherever they have been made, they have resulted from, and have been produced by, an increased elevation of the people; by an improvement in their character; in a single word, by an increase of education. This education has not been acquired altogether from books or from public journals, although these have done much. It has been, to a far greater extent, acquired from a practical knowledge of men, of things, of moral and political right, deduced by a people from their traffic, commerce, and association with the people of other countries, and of other govern-



ments. In the great work of extending practical knowledge, our institutions and our system, through its people, have done much ; and so long as they exercise the influence of their habits and modes of thought, passively and with an avoidance of all improper interference with the people or institutions of other countries, it will produce a moral power more potent than all our arms can exert. If these suggestions are sound, you will perceive that a moral, well educated people cannot be enslaved, or compelled to hold their reasonable rights at the will of any government. You will also perceive, that moral revolution is easier and more successful than a revolution by force can be ; that moral revolution should be sought and adopted as the means of the correction of wrong and the establishment of right, until, by repeated effort, it shall be found inadequate and impracticable. The propriety of forcible revolution is more or less dependent upon the construction and character of the government against which it is proposed to exercise the power. The inability of a system to accomplish its purpose, by the protection of private right, may arise from its construction, from the want of departments and institutions. A government whose discretion is unlimited, will not ordinarily regard the interest and welfare of the people as paramount to all other considerations. It will regard itself and its purposes, as the essential matters to be established and protected by the use and instrumentality of the people. A government whose duties are performed by the aid of independent, permanent departments or institutions, is, to the extent of the power intrusted to such departments, constantly controlled by the checks which they impose ; and, so long as those who administer these departments are faithful, they constitute a barrier between the government and the people. The origin of the government sought to be revolutionized, is another fact or circum-

stance to be regarded. A people may well and fitly resist a government established by usurpation, in opposition to and in defiance of their will, against their consent, express or implied, when they may not resist one to which they may have given assent. It should also be remembered by those who counsel revolution, that they propose to take the law into their own hands, and to adjudicate between the government and themselves upon their supposed rights, without the intervention of the other contracting party in interest. I need not say, that a judge of and in his own cause, may be unsafe.

I have referred to the subject of revolution, and to the several principles applicable thereto, for the purpose of saying, it is not applicable to our system of government, in the same sense and to the same extent, as it is and may be, to systems of a different construction. The science of government, as exhibited in the institutions of the United States, does not contemplate or regard the power of revolution as one of its elements. Our system was created and established by the people. It consists of different sovereignties, of departments, and of institutions. These sovereignties, these institutions are managed, their trusts are performed, by individuals selected by the people for a certain prescribed term of time. The administrative power, by which term I mean the legislative and executive departments of the several states, passes at short intervals of time, from one person or class of persons, to another individual or class of individuals. This change, in many of the state governments, is annual, and in all it is frequent; so that the people have constant opportunity, by a change of men or change of officers, to avoid corruption or incompetency or carelessness, so far as the same may result from individuals, who for the time being may be charged with the trusts of government. From this fact, you will perceive that revolution

is not essential to the people, or to a maintenance of their rights and liberties, so far as they may be disregarded or endangered by the individuals in power or place. These individuals, in most cases, are liable to be removed by impeachment, or other mode of removal, if faithless or incompetent; and so long as they remain in office are subject to the charters and constitutions under which they act, as a limit within and by which they are bound. This fact is true in relation to the federal government. The legislative department, in one branch, which is the popular, and in some respects the most important, may be changed every two years; the other branch, the senate, is partially changed every two years, and every six years may be filled by persons, no one of whom shall have occupied his place, under one and the same election, more than six years. The chief executive officer, as you are aware, is changed, or may be, every four years. The result of this arrangement is, that no person can hold office, under the federal government, except judicial officers, for more than six years, against the will of the people. The persons in office, upon cause shown, may be displaced in less time; and all judicial officers are subject to impeachment and removal for corruption; so that the people, without forcible revolution, are secure in their rights, if they are true to themselves. If the system does not accomplish the purpose sought to be attained by its establishment, it may be modified and changed by amendment. The several state constitutions contain provisions for their amendment. In the constitution of Massachusetts, as it now is, it is declared, that any specific and particular amendment or amendments, may be proposed in the general court, and if agreed to by a majority of the senate and two thirds of the house of representatives, they are entered on the journals of the two houses, and referred to the general court then next to be chosen, and they are pub-

lished for the information of the community. If the proposed amendments shall again be approved by a majority of the senate and by two thirds of the house of representatives, they are proposed to the people for their consideration ; and if approved by a majority of the legal voters, they thereupon become parts of the constitution. This is a peaceful, quiet, and effectual legal revolution or change of the system of government, to the extent of the amendments which may be adopted.\* The provision to which reference has been made, exhibits certain general principles, which are in harmony with every part of the system. These principles recognize the power of the people to protect themselves ; they induce to the conclusion, that the system of government is of their creation, is for their benefit, and may be made to correspond with the progress and exigencies of society ; they also conduce to another result, which is, that changes in the fundamental law should not be rashly or hastily made, that no sudden passion or caprice should induce change. It is also apparent, that the people exercise the power of amendment to some extent, indirectly, through the intervention of their representatives.† In New Hampshire, the opinion of the people as to the propriety of amending its constitution, is taken every seven years ; if a majority of those who vote are in favor of an amendment, a convention is organized to suggest and report the amendments which in its opinion should be made ; and if they shall subsequently be adopted by a two thirds vote by the people, they become effectual as a part of the constitution. The con-

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\* Any and every other mode of amendment is illegal, is a clear violation of the constitution, and a subversion of the fundamental law.

† This provision was introduced from an impression, that the representatives of the people would be in possession of information, derived from every part of the commonwealth, in relation to the working of the system, and would be competent to discuss in a dispassionate manner the fitness of any proposed amendment.



stitution of the United States may be amended. Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of the constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress, provided, (among other things,) that no state without its consent, shall be deprived of its equal suffrage in the senate.\*

The power of amendment is carefully guarded, and

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\* The constitution of the United States cannot, rightfully, be amended in any other mode. If the provision recited is directory, or if the people, acting upon their supposed ever present inalienable right over the government, may, by a majority of the voters throughout the United States, or by majorities in a major part of the several states, disregard any part of the provision, they may disregard the whole, and by their action may disfranchise some one or more of the smaller states, by taking away their equal right of suffrage in the senate of the United States. The writer is not aware that such theory has ever had, or can have any plausible ground for its support. Mr. Justice Story, in his commentaries upon the constitution, referring to the clause providing for its amendment, says, "Upon this subject little need be said to persuade us at once of its utility and importance. It is obvious that no human government can ever be perfect, and that it is impossible to foresee or guard against all the exigencies, which may in different ages require different adaptations and modifications of powers to suit the various necessities of the people. A government forever changing and changeable, is indeed in a state bordering upon anarchy and confusion. A government, which in its own organization provides no means of change, but assumes to be fixed and unalterable, must after a while become wholly unsuited to the circumstances of the nation, and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering and improving the fabric of government, as time and experience, or the new phases of human affairs may render proper, in order to promote the happiness and safety of the people. The great principle to be sought is, to make the changes practicable, but not too easy; to secure due deliberation and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory." These observations are replete with sentiments of patriotism; they exhibit the profound knowledge and



cannot well be used to the injury of the community, unless it shall become careless and heedless of its rights and its duties. Notwithstanding the power is conferred in general terms, and, if exercised in the mode prescribed, seems to be boundless, it should be regarded as a limited and qualified right, not to be exercised to the destruction of private right, or in derogation of the fundamental principles which are proclaimed in the bills or declarations of right. The power of amendment was designed to sustain and uphold our political and social institutions, and not for the purpose of destruction, or with intent to procure their entire subversion. The power, so far as the several states are concerned, is by implication so far restrained by the constitution of the United States, that no state can rightfully so amend its constitution as to establish thereby any form of government, which is not in form republican. The federal constitution, when submitted to the people for consideration, was opposed. It was adopted in three states unanimously: Delaware, New Jersey, and Georgia. The instrument became operative by the vote of New Hampshire, the ninth state which accepted it, by a vote of fifty-seven in favor, and forty-six against it. Many of the states, at the time of their ratification of the instrument, suggested and recommended amendments, some of which were subsequently adopted, in the mode prescribed for the adoption of amendments, and became part of the constitution. The proposition to amend was made in the first congress by Madison, who urged the necessity of some speedy action to meet the expectation, and to quiet the impatience of the numerous

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sagacity of their eminent author. Limitations of the mode in which amendments may be made, are no less or more obligatory upon the people, than are limitations upon the subject-matter of amendments. Provisions for amendment, contained in a state constitution, so well as those in the constitution of the United States, should be adhered to, and should be exercised with fidelity.

friends of amendments. Some of the members opposed all action upon the subject, until the instrument had been in operation for a period sufficient to determine its capacity and fitness. This proposed delay was successfully resisted. The friends of amendment did not propose to reconsider or change the general frame and structure of the system; but from motives of policy, and for the purpose of improvement, suggested several provisions, designed to insure the protection of personal rights. One proposition of amendment, of an important bearing and character, was made, which was rejected. It was proposed to amend, so as to confer upon the people "the right to instruct their representatives." Several members advocated this amendment, with an understanding on their part that it would not imply, on the part of the representative, any obligation to obey. Mr. Gerry, a distinguished and patriotic citizen, advocated it under such an impression, in relation to its force and effect, if adopted. Those who favored it, generally considered it absolutely necessary, and strictly compatible with the spirit and nature of the government. It was urged, that all power was vested in the people; that the system contemplated a government of the people, a democracy; that the people, for convenience only, had agreed that their representatives should exercise a part of their authority; that a denial of the power of the people to instruct their agents, must be regarded as a denial of one of their inalienable rights. These suggestions were resisted, and their purpose defeated. It was urged by those who entertained different views, that a right to instruct a representative, if it implied no obligation to obey, was idle and useless; that the people without such provision, were at liberty to express their opinion of the measures, of the conduct of government, and that such opinion must of necessity command the consideration and respectful attention of

the representative. If the proposed amendment should be regarded as imposing an absolute obligation of obedience, it would be pernicious, and ought not to be adopted. In opposition to the proposed amendment, Mr. Madison said, Suppose a representative is instructed to violate the constitution ; is he at liberty to obey such instructions ? Suppose he is instructed to support certain measures, which, from circumstances known to him, but not to his constituents, he is convinced will endanger the public good, is he obliged to surrender to their judgment his own ? Suppose he refuses, will his vote be the less valid, or his constituents less bound to yield that obedience which is due to the laws of the union ? If his vote must inevitably have the same effect, what sort of a constitutional right is this, to instruct a representative who has a right to disregard the order if he pleases ? Those of a different opinion ask, if the sovereignty is not with the people at large. But is it to be inferred, that the people, in detached bodies, can contravene a law established by the whole people ? My idea, (says Mr. Madison,) of the sovereignty of the people, is this, the people can change the constitution if they please ; but while it exists, they must conform to its provisions. I do not believe that the inhabitants of any district can speak the voice of the people ; so far from it, their ideas may contravene the sense of the whole people ; and hence the doctrine of the binding force of instructions is of a doubtful, if not of a dangerous character. In thus saying and in thus voting, Mr. Madison acted upon his own responsibility and judgment, in opposition to the supposed sentiments of the state which he in part represented, and in opposition to the sentiments of the political party to which he belonged. The supposed right of instruction had its origin with the commencement of our system, and has been the subject of continued discussion. That it does not exist as a matter of right, may be in-

ferred from the fact, that it is not found in the constitution, and from the failure of the effort made to have it inserted as an amendment. The principle which has been relied upon in its support, is sound, and cannot successfully be denied or controverted. Whether the principle by which the right of instruction is sought to be maintained can be applied, is an entirely different and distinct question. It is true, that the principal may instruct his agent; that an agent is bound to follow the instructions of his principal. No position more accurate or true can be stated. It is equally certain, that a principal may delegate certain authority to an agent, to accomplish certain purposes, and may clothe such agent with irrevocable power, or with power revocable, under certain limitations. In other words, a principal may if he chooses, confer upon an agent powers which, by his own consent and agreement, he will not and cannot withdraw. The right of instruction is to be determined by an application of these principles, as they may or may not apply to our system of government. It is and frequently has been said, that the representatives of the people and the officers of government, are the servants and agents of the people, and as such are bound to regard their will, at all times and under all circumstances. In other words, that the people are above all law. This is not true, however unpleasant the declaration may be.

The representatives of the people and the officers of government, are the servants and agents of the people to perform certain political trusts, in conformity and in accordance with certain charters or constitutions which the people have voluntarily established as their guide, and as the source from which their powers are derived, and are to be ascertained. It is the prerogative of American citizens to say, that they live under a system of law; that their liberty is regulated by law; but they



cannot add, that it is their prerogative to disregard the law, simply because they are its founders and authors. Apply the principle which I have endeavored to illustrate to the case of a magistrate or judge: the magistrate is a servant and representative of the people, but he is not and cannot be bound by their instructions, except so far as they may be contained in the constitution and laws, for the construction of which he is the agent. Equally true it is of the representative, and of every officer known to the law. They and each of them are bound, in the discharge of their respective trusts, by constitutions and by the law of the land. The people may express their opinions, may discuss the conduct of their servants and agents, and, at intervals of time, displace them; and they may enlarge or diminish their power, by amending the system, in the mode prescribed, under which they act; in no other way can they instruct or control them. They have no occasion to instruct or control them in any other way. The powers of amendment, of election to office, which the people undoubtedly possess and enjoy, are ample, as means of correcting all evils which can result from any deficiency which may be discovered in the construction of government, or which may occur from the corruption or incompetency of individuals selected to discharge its trusts. The power or supposed right of instruction is more plausible and is less dangerous in its tendency, than another supposed right, somewhat similar in its character, which has frequently been asserted and encouraged. I refer to the assumed power of nullification, which some politicians have advocated. The doctrine which, under this term, has been set forth, had its origin in a resolution of the Assembly of Virginia. In the resolution referred to, it is declared, "that the powers of the federal government, resulting from the compact to which the states are parties, are limited by



the plain sense and intention of the instrument constituting that compact, and they are no farther valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." This declaration is an able, ingenious, and fascinating definition of the right or power which it upholds. It is so mingled with truth, that its fallacy may easily escape observation. It contains three distinct propositions; two of which are entirely without any constitutional or reasonable intendment in their favor, and cannot, so long as the union and its system shall remain, be sustained; the third is sound, and has always been conceded. The declaration assumes, that the constitution of the United States is a compact between the several states, acting as independent sovereign contracting parties; that the federal government, independent of such compact, has no power or existence. The second proposition is, that the powers of the federal government are limited; that it is intrusted with certain specified trusts, beyond which it cannot rightfully act; that these trusts are enumerated and defined in a paper which the declaration designates a compact. The third proposition or principle is a logical and necessary result of the first, and it is, that the several states may for themselves determine, whether the federal government has or has not in any case transcended its limited powers; and if it has so transcended its power, in the opinion of any state, such state may disregard and nullify the action of the federal government. In other words, a state sovereignty may submit to the power of the federal government at its election. This

theory was condemned and rebuked by President Jackson in terms and in tone not to be forgotten. The proclamation which he made in relation to the principles deduced from the Virginia resolution, will be remembered, and its influence will be felt here or elsewhere, when all his battles, all his victories shall have faded in the memory. The fallacy of the declaration to which reference has been made, consists in an assumption, that the constitution of the United States is a compact, treaty, or agreement between the several states as sovereignties ; and that it is not an independent system of government, supreme within its prescribed limits. When sovereign powers contract with each other, they must, in the nature of things, determine on each and either side, whether the other may have performed its obligation, and if not, to redress itself. No tribunal or congress of nations has been established by which disputes and disagreements between sovereign states can be adjudicated ; and, in the absence of such power or institution, they must decide their own rights for themselves. This principle has no application, and cannot be applied to a system of government which has provided departments and machinery, by which its rights and the rights of its citizens are to be determined. The constitution of the United States is not a compact between states ; it is a system of government, established by the people for their benefit, with the consent and approbation of the several states, which consent cannot be withdrawn or evaded until the system itself, by force or other means, shall cease to exist. This truth is prominently and distinctly stated and recognized in the constitution of the United States. It has been recognized by the supreme court of the United States in many and in all of its judgments, whenever the subject has been matter of discussion. These judgments, in many instances, have been pronounced with great force and ability by

the late most eminent chief justice of the United States, the ablest jurist which Virginia has ever had, of whom, and of whose memory she, with her sister states, may justly be proud. The second element contained in the declaration to which reference has been made, is true. The federal government is a government of limited power, which it cannot rightfully transcend or disregard. Its powers are to be ascertained by a resort to the constitution of the United States, not as a compact or treaty, but as a system of government; and they are, in the language of the resolution of Virginia, limited by the plain sense and intention disclosed in and by the instrument. In this particular the resolution is true, and cannot successfully be repudiated or denied. Suppose the government, in some instance, has passed, or shall pass beyond its limit, who is to determine the existence of the error, of the evil, and correct its effect? The constitution has provided for this supposed contingency by conferring upon the judiciary of the United States complete and full jurisdiction over all rights, all obligations or wrongs which can or may exist or arise under or against the constitution of the United States, or under treaties or laws made or assumed to have been made under or against its authority. This is a peaceful, constitutional, and adequate remedy, under the federal, as it is, in matters appertaining thereto, under the state sovereignty. In the hands of an intelligent, learned, and honest judiciary, the rights of the people always have been, and always will be safe. It is in the power of the people at all times to have an intelligent, learned, and honest judiciary. They cannot, therefore, have an occasion for aid from any false or dangerous assumption of power.

I have referred to this subject for the purpose of impressing upon your minds, that our system of govern-

ment is a system of institutions, of departments, of law, in and by which your rights are upheld.

A supposed right of secession has been occasionally set up by politicians. It has not acquired so much celebrity, and has not been advocated with so much power or ability, as have been exhibited in support of nullification. If either of the theories can be sustained, upon logical or political considerations, secession has the advantage. One of these theories assumes, that a state, by virtue of its supposed compact, may continue in the association, as a member or contracting party, and may yield obedience to the laws and institutions of the association, so far and so long as they may be convenient and agreeable, and may resist and reject its laws and institutions whenever they may be considered inconvenient and disagreeable. Secession, as generally understood by its advocates, is a right in an individual state sovereignty to withdraw from its supposed compact with the association, and unfold its banner, as an independent sovereignty, free from every restraint by, or obligation to, the union, or to the other states composing the union. This theory does not regard the federal government as a system established by the people independent of state sovereignty, although with the consent of the several states; but proceeds upon the ground, that the several states by becoming members of the union, have temporarily surrendered some portion of their sovereignty, which they may resume at pleasure; that the state governments, in their relation to the union, are not limited jurisdictions, charged and intrusted only with the execution of a certain portion or quantity of political trusts. If such be the true theory of the system, secession is an undoubted right, and may be exercised by any and by every state at will. The federal sovereignty, in this view, is altogether ideal and fallacious; and we



live under one, and only one sovereignty or jurisdiction, which is that appertaining to the state. On the other hand, if the system be such as I have attempted to show, secession has no existence as a right, and cannot be exercised by any state, or by any number of states.\*

The constitution of the United States, as I have often remarked, was established by the people, as and for a government of the people, and not as a government of states or sovereignties. The several states were not obliged to surrender a portion of their sovereignty to the people, and thereby suffer or permit a transfer of such surrendered portion of their powers to another institution or sovereignty. The doctrine of secession proceeds upon a supposition, that the depository of power under our system is nominally twofold, but in fact is individual and exclusive in the several states. I say the depository of power is regarded as twofold, upon this theory, because the power of the union is admitted, as a rightful jurisdiction, proceeding for the time being, hand in hand with the several states until the state shall secede, and take with it all power. If I have succeeded to any extent, however faintly or feebly, in presenting our system, you cannot fail to have seen, that the depositories of power are three: the people, the state sovereignty, the federal government. These together constitute a perfect whole. No one of the three can enlarge its own power, or diminish that of either of the others, so long as the system remains. No two of them can destroy the third, except by an unauthorized exercise of power which the system does not contemplate as a probable contingency; which the people of the United States will not permit, until

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\* Those who may wish to combat the positions of the writer, may examine "*Raule on the Constitution*," and "*A Disquisition on Government*," by Calhoun, 1 vol. of his Works; neither of which sustain the undoubted abilities of the respective writers.



their character and habits shall be entirely changed. These theories need only to be stated to be fully comprehended, and to be rejected by every careful and patriotic mind. They have been produced by, and have resulted from, an undefined, supposed theory of state rights.

These terms (state rights) may be used, with reference to the several states appropriately; they may be used, and generally have been used inappropriately, and without any definite meaning. The several states have certain powers, duties, and trusts, in relation to which they are independent and supreme, and are not and cannot be controlled in their exercise by the federal government. In these particulars they are responsible only to their several constitutions, and to the citizens within their respective limits and jurisdiction.

These are state rights which every citizen is bound to respect, which are to be sustained and upheld in the mode and in the manner which the system has provided for their protection. The United States, the union, have rights, which are to be upheld in the mode prescribed. These rights are limited, but supreme and independent within their limit. The rights of these two jurisdictions are not in opposition to, or in conflict with, each other. Any attempt to enlarge or magnify the rights of the several states or of the United States, by a diminution or destruction of those of the other, or to increase or extend either the one or the other beyond its constitutional limit, must be unavailing, or destructive of the system. The several states are not endangered, in the possession of their legal and constitutional rights, inasmuch as the federal government has no power, except such as is derived under an express grant, or by implication fairly and reasonably deduced from an express grant. If the terms, state rights, are used as importing the existence of an uncertain and unknown boundary between the several

states and the federal government, and that those who regard the rights of the several states are bound to extend the jurisdiction which they exercise, so far as possible ; that the two governments are in fact or may be in a state of warfare, or contest for power, each striving to increase its own, regardless of the other ; they have no foundation in our system, in truth, or in the fitness of things. In this supposed sense or use they are fallacious, dangerous, and to be disused. If they are used as importing a declaration, that the several states have certain constitutional powers, supreme and independent, which are to be watched, sustained, and protected from encroachment, coming whence it may come, they express a truth, and as such are to be respected. Examine the questions of nullification and secession, with the aid of analogy derived from the common business of life. An individual employs two agents, or trustees, to each of which he confides some portion of his business. Neither agent has a right to encroach upon, or to interfere with, or to take upon himself the duties of the other. These agents may be charged with duties which the principal cannot resume, or which he cannot resume except under a peculiar state of facts provided for, by his own voluntary act.

The people of the United States have established two agents, two sovereignties, to which they have severally confided certain trusts. They have established and given written instructions, in the form of constitutions ; they have created departments ; they have provided a mode by which these instructions may be varied and changed. They have stipulated, contracted with the agents so appointed, that the trusts so confided shall be irrevocable, until resumed in the mode and in the manner which they have prescribed for their resumption. If this be a true and a fair statement of our system, no state can nullify the acts of the union ; no state can resist or secede from its

organization. The people cannot control their agents, except by the right of suffrage, and by the influence which their opinions, their moral power, may rightfully command ; they cannot resume their grants of power except by an amendment, legally made, of the instrument by which they may have been conferred. It may be suggested that the system, as I have presented it, admits of only one construction ; that no difference of opinion can exist. This is not so ; the science of government cannot be defined with unerring, perfect accuracy. No system or form of government can be perfect, or so accurate as not to admit of an honest difference of opinion, as to the import of its details, in every particular. Parties disagree as to the force and effect which should be given to this or that provision. It does not follow, that they do not seek the attainment of the same end, or that the system in its great purpose may not easily be understood or carried into effect. It is equally true, that a government may constitutionally have powers designed to meet the ever changing condition of civil society, which may or may not be exercised ; the expediency of their exercise may be a fair subject of discussion, and may produce honest differences of opinion.

In the United States, the science of government must be discussed. It is not a matter in relation to which a knowledge is, or should be confided to some select few individuals. The people are the source of all political power, and in their hands it must be productive of good or evil. No man can safely undertake to escape from his individual responsibility, or to impose upon others the duties of his station and condition, whatsoever it may be. It should also be remembered, that in this country every man is the founder and the architect, to a great extent, of his condition. Discussion must and will be had ; the people must act with or without knowledge ; the insti-

tutions which they have established, furnish adequate means of information to all who may desire its acquisition. These discussions have a salutary influence ; they serve to elicit the truth ; they afford sources of information useful to those charged with a performance of the public trusts. More than this, they produce a healthy action of the public mind, and give to its judgment and opinion, a moral force not readily resisted. In a discussion of an abstruse science, it is essential to use exact terms. In an examination of the physical laws of nature, cause and effect must ever be regarded. Equally clear it is, that in a discussion of any system of government, precision in the use of language is of the utmost importance. It is not essential, it cannot be supposed, that the great body of the community can abandon their daily pursuits, and become accurately conversant with all the principles of legal science, or with all the propositions and deductions of political economy. They can, however, acquire a knowledge of the principles of right, of justice. These principles constitute the foundation, the corner-stone of your system of government ; of which system, one of its most valuable and important features is shown in its provision for amendment. Revolution, nullification, and secession are only different modes of forcible resistance to the constituted authorities ; they are entirely displaced, so far as right or necessity may be concerned, by the provision for amendment, a quiet, humane, and effectual remedy, when properly applied, for the evils for the correction of which in many systems, such forcible measures are and may be regarded as fit and available. In military language, I admonish you to stand by your arms, which are your constitutions and their institutions.





## LECTURE XII.

THE DANGERS AND CAUSES OF DANGER INCIDENT TO THE SYSTEM.—THE REMEDY  
OR MEANS OF AVOIDANCE.

THE construction of the system of government under which you live, has been presented for your consideration. Many of the prominent incidents connected with, or growing out of the system, have been the subject of reference and consideration. An endeavor has been made to exhibit the relation and purpose of its different parts. If you shall be disposed to follow out, and examine the suggestions which have been made, although you may regard them, in some particulars, as unsound and erroneous, you will discover at every step, the same general principles and object. These principles, and the purpose, so far as I have been enabled to discover them, may be expressed in few words. An intelligent, well educated people, are competent to establish political institutions, by the means of which, and through the instrumentality of departments appertaining thereto, they may indirectly and ultimately be the source, and the agents for the execution of all and every political power, essential to the maintenance of a chastened, well regulated civil society. In any survey which you may make, of the history and progress of your country, of the character of those who

first landed upon a neighbouring shore, you will find many things worthy your respectful consideration. The original discovery of the country, must be regarded as an event or fact, the consequence of which no man can predict. The declaration of independence, by its boldness and sublimity, admonished and astonished the civilized world, and gave to the inalienable rights of man an impress and form which they had not previously attained. You may recur to these events with admiration, and even exultation. It is your privilege so to do. Mightier than these events, is an event which followed. Mightier than these was and is, the act by which the federal constitution disclosed the science of government, as exhibited in the institutions of the United States. Is the system therein disclosed perfect, or free from danger? It would be presumption to say that it is. Every system, every institution of human invention, every individual is surrounded by danger, by many and constant causes of danger.

Some of the dangers applicable to our system will be suggested briefly, from which you will perceive the character of others. They are twofold, external and internal. The external causes of danger are remote. The territorial position of the United States does not invite foreign aggression, or render it easy. Many of the countries and governments of Europe are territorially near each other; they are obliged, therefore, to some extent, to guard themselves, by guarding and watching their neighbors; this has induced some of them to encourage, and to insist upon the maintenance, between themselves, of a balance of power. The construction of many of the European systems of government affords an opportunity, to those who govern, to use the government and its power for the gratification of personal ambition. The dangers which surround such governments are constant, are imminent. The United States are not immediately

liable to similar dangers. Foreign nations being remote, and having trusts of their own which require attention, will not, under ordinary circumstances, interfere with or molest our country. The governments upon the continent of North America, not subject to the federal government, have no inducement to make aggression upon their neighbor; if such inducement should hereafter exist, their power and ability, unless aided from abroad, is not, and probably may not be such as to excite uneasiness. Unless the United States shall undertake to exercise a general supervision over the affairs of foreign governments, or shall unreasonably neglect to perform their duty, to maintain their own self-respect, no serious or important danger, or cause of danger, can arise from any external source.

The internal dangers, and the sources from which such dangers may come, are of a more important character, and are more numerous. These, or some of them, will be suggested. Extent of territory has been often suggested as one of the circumstances or facts from which danger to our institutions may be apprehended. That the government cannot extend its protection to the extreme points of an enlarged territorial jurisdiction; that the distance which must exist between cause and effect in an enlarged territorial jurisdiction, will operate to diminish the one and exclude the other from observation. This, as a proposition considered by itself, without reference to other facts or circumstances, may and must be regarded as sound. Government must, in the nature of things, be limited to a territory accessible at all times, and over which its power may be rendered available, without suffering diminution from distance or delay in its execution. No government can safely undertake to extend its power over the whole globe. An effort by any government so to do would prove useless, and of no

avail for such purpose. A limit of territory must, therefore, be applied to every government. This limit cannot be determined by any known fixed standard. A continent or territory standing by itself may be managed and controlled by the same system or sovereignty, more easily than the same extent of territory can be which is in the immediate vicinity of territory subject to other governments, between which there must be intercourse and relations of trade, legal or illegal. So far as proximity of one country to another bears upon this matter, the position of the territory which composes the United States is favorable. Many other circumstances have a bearing upon any determination which can be made upon this subject. Extent of territory may, by its magnitude, produce a difference of climate, difference of thought, and a diversity of interest. The settlement of the country known as the United States, was not made by people of the same origin. Different sections of the country originally presented this feature in our history in distinct and marked boundaries, which have not disappeared. Whenever a body of men leave the land of their birth, to commence a new work of enterprise in a foreign land, they may abandon their early home, but its associations, its recollections, and many of its institutions will continue to occupy the mind, and to some extent direct its energies in their accustomed channels. In one state, at least, of the union, the civil law constitutes, with few exceptions, the basis, furnishes the principles by which its legislation is modified and characterized. The law of France, of Spain, so far as the principles and matters of personal right are involved, determine, in some portion of our country, the ascertainment and enforcement of private right. In other sections of our territory, the civil law, the principles of the law of France or of Spain, have no force or abiding place. Our country also has within



its bound different climates. A result, by the law of nature which no man can control, from this fact, may be perceived in the habits of the people. At one extreme of the United States, its citizens are staid, matter of fact men, wrapped in a mantle of winter, which covers body and mind. In another, a more genial sun gives life and vivacity to the scenes of every hour and of every day ; here the present is ever more beautiful and joyous than an apparently unheeded, unknown future can be.

The circumstances to which reference has been made,— extent of territory, diversity of habit and of interest, naturally must be regarded as sources from which danger may be apprehended. When they are considered with reference to our system of government, with reference to the actual condition of the United States, unless our territory shall be enlarged, and the diversity of habit and interest which may result from an enlargement shall be increased and become more diverse, they cannot be regarded as serious cause of danger. The reason which induces this position is deduced from the division of sovereignty which our system exhibits. Our foreign relations are not controlled by extent of territory or by diversity of local interests. The federal government has the exclusive management of such relations. Extent of territory, and diversity of interest, are not applicable to the state governments as separate and independent sovereignties. The several states each extend to a small territory, and the interests and habits of the people of a particular state are not diverse, with reference to themselves ; they are so with reference to other states, so that these causes of danger, of apprehension, do not in fact exist, in relation to the state governments, by which all local matters are regulated. Another prominent supposed cause of danger may be found in an alleged tendency to consolidation. It has often been urged that the



federal government inclines to attain the possession of greater power than it can or should rightfully exercise. Thus far, no such intent has been carried into effect by any encroachment upon, or diminution of, the legitimate rights of the several states. Our past experience shows, that the federal government has been more frequently the object of attack than the state government. Those who urge consolidation as a possible or probable ground of danger and difficulty, do not urge the corruption of the people as the cause, although the theory cannot be true, except upon an assumption that they are corrupt or may be corrupted. The officers of the federal government are chosen by the people, or by their representatives or agents, over whom they have control. If the people are true to themselves; if they elect competent and honest individuals to discharge the trusts of the federal government, no consolidation can take place. The several states cannot be deprived of their rights, their authority and powers cannot be diminished or transferred to another government, except by the action of their own citizens; and it cannot well be supposed, that they will conspire or coöperate to destroy themselves.

In our system of government the legislative department has more power than any other department. The individuals which compose it are more numerous than those of other departments, and from this and from other causes, are more easily corrupted. They are more directly within the power, and under the control of the people, than are the individuals of any other department. Their corruption, their incompetency, their inclination to consolidation can be prevented and corrected, if need be, by an exercise on the part of the people of their right of suffrage.

Another barrier against consolidation is found in the independence, learning, and integrity of the judicial

department. All our institutions, including those of sovereignty, are limited by written constitutions; and if the legislative or executive departments shall attempt to transcend their rightful jurisdiction, they may ordinarily be repressed and restrained by the judicial department.

The federal government must adhere to its system, to its duties, and cannot successfully usurp power, until all its departments shall become faithless and corrupt. They cannot attain such position, until and unless a large proportion of the entire people become corrupt, and willing to destroy themselves. The danger of consolidation, therefore, and of the perversion and destruction of the rights of the people, must be regarded as ideal and fanciful, and not substantial, inasmuch as it cannot, from our past history, be inferred that the people will readily become the instruments of their own destruction, of their own degradation. Such a result cannot be imputed to, or derived from, the character of the people, or their system.

Another source of danger may occasionally be found in a resistance of some few of the populace, to law, to the constituted authority. It cannot be supposed, that the legislation of the federal or of the state sovereignty will always be acceptable to the entire people. In some instances, dissatisfaction may extend to a large proportion of the community. Legislation cannot rightfully be resisted by force, although it may be disapproved, more or less extensively, by this or that portion of the community. If any particular legislation is or may be unconstitutional, the courts of law are bound to resist and to reject its supposed validity, to relieve the citizen from its control. It may, without boasting, be said, that the judiciary of our country, state and national, has had the moral courage to do its duty; and I doubt not, it will con-

tinue to exhibit a fearless regard for the people and for their rights.

In the course of the discussions which you have heard, in some few instances I have dissented from judicial opinion ; whenever I have so done, I have stated the fact, and have given the reasons of my opinion, adding that the adjudications of the judiciary, until changed by the power which made them, are to be regarded as the law of the land, however they may differ from my, or from your opinion.

If legislation is injudicious, or in its effect unnecessarily inconvenient, or restrictive of the business and interests of the community, the people, by its peaceable expression of opinion, through the press, and by means of private conventions and correspondence, can correct and control it. If public opinion so expressed shall prove inadequate, by the exercise of the right of suffrage, the people can effectually cure the evil by a change of the legislators, and of those who discharge the trusts of government. Resistance to law by force, therefore, is not essential to the people, or to the protection of their rights ; and whenever adopted, must operate to diminish, to destroy, the institutions and the moral power of the people. I have spoken of resistance to law, regarded as a political matter. It is regarded by some as a moral question. I cannot discuss it in this aspect, except to say, he who regards his conscience as paramount to human law, assumes that the dictates of his individual conscience, regardless of the consciences of others, are perfect ; that they may, that they must be regarded by him as the certain, well authenticated, unerring law of God ; an assumption which, in my judgment, cannot be sustained by or deduced from any sound theory of religion, natural or revealed.

The admission of new states may produce difficulty and danger. This may arise in several ways. A new state cannot come into the union, except its constitution shall conform to that of the United States, and shall be approved by the other states, acting through their representatives in congress. A new state naturally is inclined to suit itself in its local institutions, and is jealous of interference by or from its neighbors. This was distinctly perceived when Missouri was admitted ; the danger, however, passed away, notwithstanding, for a time, it bore a threatening aspect. Another difficulty may arise from the haste and anxiety with which the people of a territory may wish to improve their condition, without fully ascertaining whether they may have acquired sufficient strength and ability to take care of themselves. New states may entertain an opinion, that they are not only entitled to political power equal to any other state, (to which they are entitled,) but are also entitled to have an extra protection and expenditure in their behalf from the public treasury, so as thereby to be placed upon an equality, in the extent of their wealth and business, with the states of an earlier origin. In private life, it is not unusual to find young people unwilling to begin the active pursuits of life, in a moderate, unostentatious manner, as their fathers may have begun ; so it may be with new states.

Slavery is an evil, a danger ; it is surrounded with cause of danger. It has no existence in the law of nature. It is not in accordance with, but is an exception to, the general political theory upon which our institutions rest. It is local in its character ; and wheresoever it does exist, it is by force of the local or municipal law of the territory, within and by which it may be established. No intendment or presumption is made in favor of its existence, by any general, fundamental public law.



Whenever, or wherever its existence may or shall be asserted, it must be proved. When the federal constitution was adopted, slavery existed in many of the several states, by and under their respective individual and local law. As a matter of compromise, those who prepared the constitution permitted it to exist, by and under the local law; and so far as it is, or was by that instrument permitted to exist, it is upheld and sustained, in and by the same instrument. Its ultimate extinction, its final remedy, is within the control, and is under the guidance of God. Its remedy, so far as you and your system of government are or may be concerned, may be stated in few and simple terms: that remedy is, let it alone; leave it where the constitution of your country has left it.

The election of President, and in connection therewith, a desire of office, of station, and political place and influence, may become the cause or source of difficulty and danger. The constitution of the United States has provided for the election of President, by the intervention and agency of electors. The theory and provision of the constitution upon this subject is, that the people, voting in the several states of which they are citizens, will elect for this important trust men of experience, of intellect, and character, who may have acquired a knowledge of the fitness and capacity of those who may propose or be proposed, for the presidency. That the electors so chosen will discharge the trust confided in accordance with their judgment, improved and corrected by any and all information or suggestion which they may possess, or have received, bearing upon the selection to be made, keeping in mind the character and responsibility of the trust reposed, not forgetting their duty to themselves, to their constituents, to their country. These electors are officers or agents known to the law, to the constitution; and as such, should discharge the duty which



the law, which the constitution imposes. An adherence to this theory of the constitution has in form been preserved. In reality, its spirit has departed; and the President of the United States is now practically chosen by some one of two or more private party conventions or caucuses, convened under the auspices and patronage of the different party organizations which pervade the country.

These conventions are not peculiar to any particular party, but all parties have resorted to them as a mode of ascertaining and expressing their respective preference. The electors, when chosen, discharge their supposed duty, by casting their votes for the person selected by the political caucus of the party to which they may be personally attached. These conventions had their origin in the fact, that they furnished a convenient mode of ascertaining and concentrating public opinion, from and in every part of the country; their continuance has been occasionally encouraged and sanctioned by politicians, partisans, office holders, and office expectants. They may produce evil, and they may not; they are merely private organizations, unknown to the law, and have no official or personal responsibility which can be reached. If the members of these conventions shall be chosen, without any improper or undue practice or management imposed upon the people; if they shall be men of integrity, regardful of the public rights and duties, no apprehension of danger can arise. On the other hand, whenever these conventions shall be the result of intrigue, or shall be composed, to any considerable extent, of office holders or office expectants, danger may and must be produced by their action.

Another source of danger may be found in efforts on the part of the several states or of their citizens, to encroach upon and to diminish, the rightful jurisdiction

of the federal sovereignty. Efforts of this description should be resisted, should be regarded in the same manner as efforts to produce consolidation are or may be.

If the one or the other sovereignty, shall successfully, for any length of time or in any important particular, improperly enlarge its power, the system of government under which we live will be shaken ; and it matters not, whether the disarrangement shall come from the state or the federal branch of our system. Of the same class and character is interference by any one of the several states in the affairs of another, which, whenever attempted, must produce angry and excited feelings, which may be easily produced, but not easily subdued.

Another source of danger exists in an inclination not uncommon in persons holding official station, to attend to the business of other official persons, by unsolicited counsel, over whom they have no power or control. The governor and the general court of a state, have in many instances undertaken, in their official character and station, to approve or disapprove some act of the president, or of the congress, over which no state or state officer as such has or can have any authority. This course is not susceptible of good, in any case ; it may be productive of great difficulty. The chief executive officer of a state may discuss the condition and business of the community over which he exercises an authority, and may consider the operation and influence, which may have been produced upon the people or their business by the laws which operate upon them, including those of the United States. Whenever such officer comments upon the official acts of the federal sovereignty with approbation or disapproval, with intent to bear upon any party politics or organization, he disregards the dignity of his station, and thereby may bring reproach upon it. A general court of a state may rightfully suggest to congress the

propriety of an amendment of the constitution of the United States, and may request its accomplishment; and if a sufficient number, two thirds of the several states, concur in a similar application, an amendment may be obtained. Whenever the general court of a state undertakes officially to pass judgment upon matters without its jurisdiction, it can have no influence, and such course is objectionable.

In every part of our system, limitations of power and of authority are found. Each sovereignty, every department, and every officer acts under and upon a limited trust, for the exercise of which those charged therewith, and those only, are responsible, and no one should attempt to go above or below his station, or its duties.

In all the private transactions of life in which an individual employs two or more distinct agents for several and distinct purposes, one agent does not and cannot undertake to pass judgment upon, or control the conduct of the other. This principle is alike applicable to political and commercial agencies. Persons holding office under any one of the several states, acting as private citizens and not officially, by petition, memorial, remonstrance, or through the press, and in various ways, may rightfully comment upon the conduct and acts of any and of every public officer or department. Such comment should receive the consideration which its reasons, or the character, position, and intelligence of its authors may rightfully command. The moral power of a citizen, properly exerted, is of great value and import. He has a right to express his views, and it may be his duty to express them. It is not the duty of an agent to intermeddle in the agency of another; such interference by and between political agents has and should have no moral power.

Another source of evil may arise from the existence

of self-constituted advisers, not known to or recognized by the law ; persons who, for the public good, voluntarily and without any ostensible personal interest, undertake to exercise upon legislative and other departments, an outside, external influence.

Individuals who have private interests which may be entitled to protection, assert them by petition, or in some other open legal manner, and the facts and rights dependent thereupon, are ascertained and protected, so far as legally or equitably they may be, and such course is free from objection. Any effort to influence legislation for public or private interests, in any other than such open application and hearing, must be regarded, in the language of underwriters, extra hazardous.

One of the inducements to locate the seat of the national government at the place in which it now is, had its origin in the fact, that the city of Washington was thinly inhabited, thus affording to the members of congress and of other departments, an opportunity to pursue their several occupations free from the annoyance and evil, which otherwise, it was supposed, might result from external influence. Influence of this character, I have no doubt, has been and is exerted in every state of the union, frequently, and perhaps always, without improper or unlawful intent. I have no doubt sound and proper legislation may have been facilitated by such influence, exerted from honorable and praiseworthy motives. The motive which may induce such action, the good which may result therefrom, does not authorize the encouragement, approbation, extension, or continuance of any influence, except such as may be exerted in a manner which the system contemplates. Information of the condition of the country, of its business operations, and of its rights and duties, may be had by any and every officer or department, which has or may have occasion for its possession or use.



Temporary evil has occurred, and from the nature of our system will occur, from and by an occasional election to office of persons whose character and qualifications have not been, and may not be commensurate with the duties of the station to which they may have been appointed.

Immigration is a source from which difficulty may arise. Some individuals regard it as a subject fraught with danger, and as a cause of great apprehension and fear. Others, looking at it from an opposite extreme, regard it as a matter free from any and all danger or cause of anxiety.

In this, as in all other matters which appertain to or are connected with our system, extreme views are to be rejected and disregarded. At an early period of our history, immigration was sought, solicited, and encouraged. At all times it has been regarded with favor; and we have virtually announced to the world, that America affords a safe retreat from the supposed political ills and evils of other countries. Our country has been benefited by immigration in many particulars; foreigners have rendered services which should not and cannot be disregarded or forgotten. Immigration may produce evil, although, at the present time, it may and must be considered remote. Land unoccupied, capable of cultivation and improvement, is abundant, and it affords opportunity for the industrious to obtain a comfortable home. The rights and privileges of an American, so long as they shall be maintained, cannot be diminished in value, because they may be enjoyed by others. It is undoubtedly true, that an individual who has the moral courage, produced by any cause, physical, moral, or political, to sever, to break the cords which may have bound him to his native land, has the courage, the moral power and ability to adopt, to mould himself to, the institutions, the habits of the



country of his adoption. So long as this shall prove true in practice, no danger can arise from immigration, unless and until our population shall become greater than our territory may be adequate to support. Whenever the number of those who may here seek repose and exemption from wrongs or inconveniences suffered at home, shall be so great as to resist and overcome the capacity, the power of our institutions to assimilate and mould them, our system, as a result, will be endangered. The facilities afforded to aliens to obtain the benefits of citizenship by our laws, are greater than are similar facilities in many other countries; our policy has been humane and liberal, and it should be. It should also be mindful of our own security and self-preservation. Acquisition of territory is a matter from which danger may come. It is well calculated to produce danger, because the subject will always elicit a diversity of opinion, the intensity of which must almost of necessity be increased by party elements and considerations. Upon this subject, great contrariety and opposition of opinion must ever exist. Each state is jealous of its own position and character, and will endeavor to improve them, if practicable, by the acquisition or rejection of new territory, as the case may be. Independent sovereignties are naturally jealous of their independence and sovereignty, frequently without much regard to the legal and proper rights of other sovereignties. Between the several states of the American union, it has not, heretofore, been the occasion of any serious ultimate difficulty, notwithstanding fears well grounded have been entertained, that passion and excitement which has been exhibited might result in producing an estrangement. It is the duty and interest of every citizen of every state, to resist, to reject jealousy, to avoid any and every matter which may produce an excited state of the public mind. In the daily business

operations which are carried on between individuals, men frequently act from impulse, from zeal not well balanced or considered. This produces evil to the community, and to those who act from such inducement. The same disposition is more frequently indulged in relation to public affairs, than it is in connection with individual, personal matters. The people, in their assumed capacity of sovereigns, are always conscious and proud of their dignity and power. This is not objectionable, it is commendable ; they should add deeds to their knowledge answerable ; they should add charity ; they should add love of their country and its institutions.

Many of the matters to which reference has been made, as sources from which difficulty may result, are outside, are violations of the system ; these should be zealously watched and guarded, suppressed if practicable.

Throughout the entire course which I have read before this Institute, I have endeavored to show, that every power has a limit ; that checks and balances are established in every possible way, so far as compatible with a free system, so far as they are or may be essential to the existence of such system. These checks and balances are applicable to the citizens as individuals, so well as to the state and to the federal sovereignty. They are alike applicable to all the depositories of power. I have endeavored to present the science of government, as exhibited in the institutions of the United States, as it is, without reference to any party or personal predilections. If in this respect I have failed, the failure is not the result of any wish on my part to flatter or mislead. If our system and its institutions shall go down, it will be from an excess of liberty, which is to be dreaded and avoided, so much as is excess of power. The truth of this is legibly written upon all past history, which any and every man who reads may learn

for himself. Prosperity has broken and destroyed individuals, over whom adversity had no power; so it is and so it may be with states. The United States occupy a position which does and will attract the observation of other nations. They have exerted, and are constantly exerting, a powerful influence in favor of the rights of man and the offices of humanity. This has been produced by and from our example, our moral power; and this is the power, and the only power which can be usefully or rightfully employed, unless to repel foreign aggression or invasion.

In matters of scientific research, in literary productions, in legal discussions, some few individuals have established a reputation which is acknowledged and appreciated by those engaged in similar pursuits in other lands. This will be extended and increased as our facilities shall be enlarged. The names of Irving, Marshall, Mason, Cooper, Webster, Prescott, Story, Sparks, Fulton, Bancroft, Bowditch, to which others might be added, are not unknown to the learned and scientific men of other countries.

It remains only to suggest the remedy, by which the supposed dangers which have been brought to your notice, and others, may be avoided. In presenting this, I shall only repeat and put you in possession of the deductions, which flow from the different subjects discussed.

The dangers to which reference has been made, and all others to which the system is incident, may be avoided, so far as human agency or control is adequate to such purpose. The system of government which I have exhibited, contains within itself the remedy. It consists in, and depends upon, the existence of four distinct facts or political elements, which combined are sufficient to accomplish the end sought. The first fact or political element is, a *division of sovereignty*, which results from the

creation of a federal or national jurisdiction, for the exercise of certain powers ; the creation of a state or local jurisdiction, for the exercise of certain other powers. The foreign relations of the country, the relation which subsists between the several states and between the citizens of the several states, cannot, except remotely, be affected by extent of territory, and then only by an enlargement beyond its present extent. These relations are not affected perceptibly by the diverse, or even adverse local interests, of different sections of the country. So far as these matters are concerned, the people of the United States have, and can have only one and the same interest. In all other matters, those which are of daily concernment, and in relation to which the local interests of one section of the country may not be precisely the same with those of another, the several state governments come in and exercise their power over small portions of territory, in which the habits and interests of the people are in unison. The state government is near at hand ; its operations are constantly perceived and observed, and are controlled by a small number of people, when contrasted with the entire population of the United States. By reason of this division or arrangement of sovereignty, extent of territory, and diversity of interest, have no practical or objectionable existence.

The second fact or element is, the creation and establishment, in each of the sovereignties, state and national, of distinct *departments*, or political institutions, by the means of which the trusts confided to these sovereignties are executed, and the rights of the citizen sustained. They are designated the legislative, the judicial, and the executive. These departments or political institutions act as checks upon each other, upon the government as a system or whole, and upon the people. The third fact or element is found in the existence of *written constitutions*, in



and by which the two sovereignties which constitute our system, and their several departments, are controlled, defined, and limited. These constitutions contain the organic and fundamental laws under which we live, and have, to some extent, a permanent existence, inasmuch as they cannot be amended or changed, except in the mode prescribed, and with the consent of a large proportion of the people. This consent must be ascertained, under certain modes, prescribed by law, which are designed to prevent haste or sudden impulse, and to afford an abundant opportunity for examination, reflection, and the exercise of a calm judgment upon any and every proposed amendment or change. These three facts or political elements may be regarded as the basis of our internal, social, and political institutions of every character or description, either state or national, public or private. They have done much, and are competent to do much, in the support and maintenance of our system of government; they may become ineffectual, and inadequate to control some political vicissitude which may occur at some future period of our history; they will become ineffectual and insufficient, unless they shall be aided and be made perfect by a continued and ever present existence of the fourth fact or political element, which is, *the education and integrity of the people*. So long as the people of the United States shall be intelligent and educated, shall maintain inviolate their integrity, shall know no north, no south, their country and its destiny will be one; their system will resist and repel every danger, will survive all and every cause of danger, except such as may result from the imperfection which ever has surrounded, and ever must surround all things human. If our system is destined to live, as I trust it is, it must live, it can live only in and upon the moral power



of the people ; it must live, it can live only in a calm, well considered, dispassionate public opinion. In the formation of this opinion, you, as well as your neighbors, have a responsibility which you may not, which you cannot shake off or avoid.

#### ERRATA.

- Page 8, line 28, for *dictates* read *dictated*.  
“ 55, “ 16, “ *to* “ *as*.  
“ 56, “ 24, omit semicolon after *thereby*.  
“ 56, “ 25, add “ “ *detained*.  
“ 134, “ 6, for *controlled* read *uncontrolled*.  
“ 145, “ 26, “ *piracies* “ *robberies*.









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